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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES BREWERS ASSOCIATION, INC., *et al.*,
Appellants,

ABE RODRIGUEZ v.

~~JIM BACA~~, Director of the New Mexico Department of Alcoholic Beverage Control, *Appellee.*

On Appeal From The Supreme Court Of The State Of New Mexico

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether a state statute requiring brewers and importers of malt beverages to affirm that the prices they charge to wholesalers in the state are no higher than the lowest prices they charge anywhere else in the United States is (i) an unconstitutional regulation of interstate commerce or (ii) preempted by the Federal antitrust laws.[1]

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[1] All parties to the proceeding in the Supreme Court of New Mexico, whose judgment is sought to be reviewed, are parties in this Court. The appellants joining in this Jurisdictional Statement are the United States Brewers Association, Inc., Adolph Coors Company, F&M Schaefer Brewing Company, G. Heileman Brewing Company, Miller Brewing Company, Stroh Brewery Company and The Guiness-Harp Corporation. Pabst Brewing Company and Olympia Brewing Company, parties below, are appellees by virtue of Rule 10.4. They join in this Jurisdictional Statement. The statement required by Rule 28.1 is attached hereto as Appendix A. Appellant Anheuser-Busch, Inc. is filing a separate Jurisdictional Statement. Appellee is Jim Baca, Director of the New Mexico Department of Alcoholic Beverage Control.

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Appellants,

v.

JIM BACA, Director of the New Mexico
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On Appeal From The
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of New Mexico is reported at 668 P.2d 1093, and a copy is attached as Appendix B. The opinion of the District Court of Santa Fe County is unreported, and a copy is attached as Appendix C.

JURISDICTION

This is an appeal from a final judgment of the highest court of the State of New Mexico upholding the validity of a statute of that state and rejecting appellants' contentions that the statute is repugnant to the Constitution and laws of the United States. The judgment of the Supreme Court of the State of New Mexico (which is incorporated in the opinion attached as Appendix B) was entered on July 21, 1983. Appellants filed a petition for rehearing on

August 4, 1983, which was denied on August 25, 1983 (Appendix D). The notices of appeal herein (attached as Appendix E) were filed in the Supreme Court of New Mexico on October 6, 1983. On October 8 and November 10, 1983, Justice White granted extensions of appellants' time to docket this appeal, ultimately to and including December 5, 1983. This Court has jurisdiction under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the United States Constitution are involved:

> Article I, Section 8, clause 3 (Commerce Clause):
>
> "The Congress shall have Power . . .
>
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."
>
> Article VI, clause 2 (Supremacy Clause):
>
> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The provisions of the New Mexico price affirmation law as amended in 1979, N.M. Stat. Ann. 1978, §§ 60-12-1 through 60-12-10, are set forth in Appendix F, and the provisions of the New Mexico price affirmation law as further amended in 1981, N.M. Stat. Ann. 1978, §§ 60-8A-12 through 60-8A-19 (1981 Replacement Pamphlet) are set forth in Appendix G.

STATEMENT OF THE CASE

1. Introduction

This case involves a challenge to the constitutionality of New Mexico's "price affirmation" law as applicable to malt beverages. The law requires brewers and importers that sell malt beverages to wholesalers in New Mexico and elsewhere to file and adhere to price schedules that include an affirmation that the prices they charge to New Mexico wholesalers are no higher than the lowest prices they charge anywhere in the United States.

This is the second "price affirmation" case to reach this Court this year. The first case involved a Connecticut statute that was held unconstitutional as an impermissible burden on interstate commerce in *United States Brewers Ass'n* v. *Healy*, 692 F.2d 275 (2d Cir. 1982). This Court summarily affirmed that decision in *Healy* v. *United States Brewers Ass'n*, No. 82-1493, 52 U.S.L.W. 3308 (Oct. 17, 1983).

We submit that the judgment of the New Mexico Supreme Court sustaining the New Mexico price affirmation law should be vacated and the case remanded for further consideration in light of this Court's decision in *Healy* and other factors discussed below.

2. Factual Background

Appellants are a trade association whose members are brewers and importers of malt beverages and several individual brewers and importers. The brewers and importers all ship malt beverages that are produced in breweries located outside of New Mexico for sale in interstate commerce to wholesalers in New Mexico and many other states. The appellee is the Director of the New Mexico Department of Alcoholic Beverage Control.

(a) The New Mexico price affirmation laws of 1979 and 1981

(i) *The 1979 Law*—In 1979, the New Mexico Legislature amended the Discrimination in Selling Act, N.M. Stat. Ann. 1978, §§ 60-12-1 through 60-12-10, to make the state's liquor price affirmation law applicable to malt beverages ("the 1979 law"). (Appendix F.) Under the 1979 law, no malt beverage brand could be sold to or purchased by a New Mexico wholesaler unless the seller (i) filed and adhered to a schedule of the prices of each of its brands in each container and package and (ii) filed with the schedule an affirmation that any such price was "no higher than the lowest price at which" the same brand in the same container and package was sold "to any wholesaler anywhere in any other state of the United States . . . *at any time during the calendar month immediately preceding the month in which the schedule is filed.*" N.M. Stat. Ann. 1978, §§ 60-12-2 through 60-12-6. (Emphasis added.) (App. 1f-2f.)

(ii) *The 1981 Amendments*—In 1981, the 1979 law was repealed, amended and recodified, effective July 1, 1981. The provisions that are pertinent here became N.M. Stat. Ann. 1978, §§ 60-8A-12 through 60-8A-19 (1981 Replacement Pamphlet) ("the 1981 amendments"). (Appendix G.) Among other changes, the 1981 amendments deleted from the affirmation requirement the words "at any time during the calendar month immediately preceding the month in which the schedule is filed." Thus, since July 1, 1981, the New Mexico law has imposed the same price schedule filing and adherence requirements as the 1979 law,[2] but the associated price affirmation provision is a

[2] Under both the 1979 law and the 1981 amendments, deviations from the prices listed on the required schedules are not allowed "unless prior written permission" of appellee is granted "for reasons

requirement of an "affirmation that the price to New Mexico wholesalers is no greater than the lowest price at which" a brand of beer in a particular container and package "is sold . . . to any wholesaler anywhere in any other state of the United States . . . ." N.M. Stat. Ann. 1978, §§ 60-8A-12 through 60-8A-15 (1981 Replacement Pamphlet). (App. 1g-2g.)[3]

(b) The Connecticut price affirmation law

On June 8, 1981, the Connecticut Legislature enacted a price affirmation law applicable to beer sold to Connecticut wholesalers by brewers and importers. Conn.

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not inconsistent with the purposes of" the price schedule and affirmation provisions. N.M. Stat. Ann. 1978, § 60-12-4; N.M. Stat. Ann. 1978, § 60-8A-13 (1981 Replacement Pamphlet). (App. 1f, 1g.)

[3] Both the 1979 law and the 1981 amendments provided that schedules "be in writing, duly verified and filed in the number of copies, form and [at such] time as required by" appellee's department. N.M. Stat. Ann. 1978, § 60-12-3; N.M. Stat. Ann. 1978, § 60-8A-14 (1981 Replacement Pamphlet) (bracketed words added by 1981 amendments). (App. 1f, 1g.) Appellee's department has prescribed two forms for use in connection with the price affirmation law. The first is a "Master Price Affirmation Schedule," required to be filed annually by July 1, which contains the affirmation that the prices listed on the schedule (i) "are not higher than charged any other liquor dealer" and (ii) "will remain in effect until notified of changes," at which time notice of intended changes will be provided on the second specified form. That form, the "Affirmation Verification," is required to be filed five days prior to the date of any intended price change. It contains the affirmation that the listed prices "are the lowest prices at which such item of liquor was sold . . . to any wholesaler anywhere in any other state . . . at any time during the calendar month immediately preceding the month in which the schedule is filed." *See* exhibits to Deposition of James R. Baca, Vol. I, filed in the District Court. There has been no change in either form since the passage of the 1979 law or the 1981 amendments.

Gen. Stat. §§ 30-63a(b), 30-63b(b) and 30-63c(b). The statute prohibited the sale of beer to Connecticut wholesalers at a package and container price "higher than the lowest [package and container] price at which such item is then being sold . . . to any wholesaler in any state bordering" Connecticut. § 30-63a(b). The statute further required, in connection with the previously existing requirement that the brewers post by the thirteenth of each month the price of each package and container of beer to Connecticut wholesalers during the ensuing month, that the brewers simultaneously file an affirmation that each posted price "will be no higher than the lowest price at which each item of beer is or will be sold . . . to any wholesaler in any state bordering this state, at any time during the calendar month covered by such posting." § 30-63b(b).

As previously noted, the Connecticut statute has been declared unconstitutional as an impermissible regulation of interstate commerce. *Healy* v. *United States Brewers Ass'n*, No. 82-1493, 52 U.S.L.W. 3308 (Oct. 17, 1983), *summarily affirming* 692 F.2d 275 (2d Cir. 1982). The court of appeals based its holding on the ground that the Connecticut law effectively set the minimum prices at which malt beverages could be sold in other states.

3. Proceedings Below

On June 8, 1979, appellants filed a complaint in the District Court of Santa Fe County, New Mexico seeking a declaration that the 1979 law was invalid and an injunction against its being applied to sellers of malt beverages. (R. 1-8.)[4] Among other things, the complaint alleged that the 1979 law placed an impermissible burden on in-

[4] "R." refers to the Transcript of Record filed in the court below.

terstate commerce and was in conflict with federal antitrust laws.[5] (R. 8.)

On January 7, 1980, the District Court granted appellee's motion for summary judgment and ruled that the price affirmation law was constitutionally valid. (App. 1c-5c.) The court rejected appellants' contentions that the law was in conflict with the Commerce Clause of the United States Constitution and was preempted by the federal antitrust laws. In so holding, the court purported to rely solely on this Court's decision in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35 (1966). (App. 4c-5c.) The District Court stated "that the case at bar is in the same posture as the *Hostetter* case," and it characterized the New York statute involved there as "a substantially similar price affirmation law" to the one in New Mexico. (App. 4c.)

Appellants appealed to the Supreme Court of New Mexico. While the appeal was pending, the 1979 law was repealed and replaced by the 1981 amendments, as previously noted, *supra*, pp. 4-5. Both sides called the New Mexico Supreme Court's attention to the 1981 amendments. The parties also presented arguments to the Supreme Court concerning the significance of the two Federal court decisions involving the Connecticut price affirmation law that were handed down while the appeal was pending. *United States Brewers Ass'n* v. *Healy*, 532 F. Supp. 1312 (D. Conn. 1982) (upholding the Connecticut law), reversed in *United States Brewers Ass'n* v. *Healy*, 692 F.2d 275 (2d Cir. 1982) (invalidating the Connecticut law).

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[5] On the same date, the court entered a preliminary injunction barring enforcement of the law against the brewers and importers, conditioned upon their execution of appropriate bonds. The injunction has remained in effect throughout the case. (R. 11-13, 227-28.)

On July 21, 1983, the New Mexico Supreme Court affirmed the decision of the District Court. (App. 1b-15b). In its opinion, the New Mexico Supreme Court made no reference to the Connecticut price affirmation law or to the Federal district court or court of appeals decisions in the *Healy* case. Moreover, while, in footnotes, the New Mexico Supreme Court stated that the 1979 New Mexico law had been repealed and made reference to the 1981 amendments (*see* App. 2b & 13b, nn. 1 & 4), it did not discuss those amendments in the text of its opinion. Rather, the court described the operation of the New Mexico price affirmation law as requiring the filing of "price schedules . . . accompanied by an affirmation that prices charged are no higher than the lowest price at which sales are made anywhere in the United States *during the preceding month*." (App. 8b; *see also* App. 13b.) (Emphasis added.) This statement describes the nature of the affirmation required by the former law, adopted in 1979. But on its face it does not accurately describe the present law that has been in effect since July 1, 1981, which does not connect the affirmation requirement to prices charged in other states "during the preceding month." N.M. Stat. Ann. 1978, §§ 60-8A-15 (1981 Replacement Pamphlet). (App. 2g.)

The New Mexico Supreme Court rejected appellants' argument that the state's price affirmation law contravened the Commerce Clause by impermissibly regulating interstate commerce and was preempted, under the Supremacy Clause, by the Federal antitrust laws. Like the lower court, the state Supreme Court relied on this Court's decision in *Seagram*. The court stated that "no material distinction exists" between the New York price affirmation law considered in *Seagram* and the New Mexico law. (App. 11b.)

With respect to the Commerce Clause argument, the New Mexico Supreme Court stated that *Seagram* held that "this particular method of regulation was valid on its face and *not* an unconstitutional burden on interstate commerce since the enforcement of the [New York] price affirmation law was stayed throughout the litigation." (App. 8b; emphasis in original.) The New Mexico court concluded that "[t]he present case is not a 'concrete case' because the enforcement of the Act . . . with respect to Brewers was enjoined throughout the litigation. Application of appropriate Commerce Clause analysis would be too speculative." (App. 9b.)[6]

On the antitrust preemption issue, the court similarly based its affirmance of summary judgment on the absence of a "concrete case." The court held that the statute was not a *per se* violation of Federal antitrust laws and stated that, "if legislation is constitutional on its face, then it will remain constitutional until such time as there is specific enforcement experience that will give us a body of historical facts upon which we can base a proper judgment." (App. 11b-12b.)

Finally, the court concluded that appellants "are not precluded from bringing a future action upon the showing that [their] case has become 'concrete,' henceforth from this determination." (App. 14b.)

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[6] In using the term "concrete case," the New Mexico Supreme Court referred to this Court's statement in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964), that the interrelationship between the Commerce Clause and the Twenty-first Amendment must be considered "in the context of the issues and interests at stake in any concrete case" and the paraphrase of this statement in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). (App. 8b, 9b.)

THE QUESTION PRESENTED IS SUBSTANTIAL

Any beer price affirmation statute such as the New Mexico law involved in this case necessarily operates to rigidify prices and affect conduct outside the state of enactment. It thus raises substantial questions of constitutionality under the Commerce Clause and of preemption by the Sherman Act. By its summary affirmance in *Healy* v. *United States Brewers Ass'n*, No. 82-1493, 52 U.S.L.W. 3308 (Oct. 17, 1983), of the Second Circuit's invalidation of Connecticut's beer price affirmation statute, *United States Brewers Ass'n* v. *Healy*, 692 F.2d 275 (2d Cir. 1982), this Court recently underscored the substantiality of the questions raised by such statutes. If there were no other considerations, these appellants would ask the Court to note jurisdiction and, on plenary consideration, to reverse the judgment below. That judgment, in sustaining the New Mexico price affirmation law, squarely conflicts with the controlling decisions of this Court on both the Commerce Clause and antitrust preemption issues presented here.

For two principal reasons, however, these appellants urge the Court not to attempt to resolve these substantial issues in the present posture of the case. Instead, this Court should send the case back to the Supreme Court of New Mexico to allow that court, in the first instance, either dispositively to resolve those issues or, at least, to clarify glaring ambiguities in its decision.

First, the New Mexico Supreme Court did not have the benefit of this Court's summary affirmance in *Healy*. This Court's *Healy* decision was not handed down until nearly two months after rehearing was denied below. Whatever may have been true of the lower Federal court decisions regarding the Connecticut law, which were available to but were not discussed by the court below, the New

Mexico court is not free to ignore this Court's decision, which binds state courts and lower Federal courts alike. The New Mexico price affirmation law, particularly since the amendments effective on July 1, 1981, appears to be similar in significant respects to the Connecticut law struck down in *Healy*. The New Mexico court should be given the oppportunity to consider the effect of this Court's decision in *Healy* on its state's price affirmation law.

Second, the confusing references in the opinion below to the original 1979 law, which has been repealed, and to the 1981 amendments, which now govern any possible enforcement of price affirmation against appellants in New Mexico, make it uncertain just what the New Mexico Supreme Court was deciding. As we shall discuss, it appears most likely that the court below simply failed to focus on the significant changes made in the price affirmation law by the 1981 amendments. Therefore, the court neither interpreted the law now (and for more than the past two years) in effect nor attempted to apply constitutional principles to test that law's validity.

In these circumstances, we do not ask this Court now to hear and resolve this case on the merits. Instead, we respectfully suggest that the Court vacate the judgment of the New Mexico Supreme Court and remand this case to that court for clarification of the implications for this case of the 1981 amendments and further consideration in light of *Healy*.

I. The Case Presents Substantial Federal Questions That Were Wrongly Decided By The State Court.

There is no doubt as to the substantiality of the questions that appellants would ask this Court to resolve if it were to hear plenary argument.

1. This Court's recent decision in *Healy* struck down Connecticut's beer price affirmation law, which required brewers to affirm that the posted prices they charge to Connecticut wholesalers are no higher than the lowest prices they charge for the same items in any bordering state during the effective period of those posted prices. As the court of appeals held, "the obvious effect of the [state] statute is to control the minimum price that may be charged by [an out-of-state] brewer to [an out-of-state] wholesaler in a sale outside of [the regulating state.]" 692 F.2d at 282. That type of regulation of out-of-state prices places an impermissible burden on interstate commerce. *Edgar* v. *Mite Corp.*, 457 U.S. 624 (1982).

We believe that the same principles apply to the New Mexico price affirmation law.[7] Like the Connecticut law, the New Mexico law requires adherence to a posted price schedule and an affirmation that the scheduled prices are no higher than the lowest prices charged by the brewers in other states. However, unlike Connecticut, New Mexico does not limit the scope of the affirmation to three bordering states, but requires affirmation that the posted New Mexico price is no greater than the lowest price "anywhere in any other state of the United States . . . ." N.M. Stat. Ann. 1978, § 60-8A-15 (1981 Replacement Pamphlet). (App. 2g.) In this respect, the New Mexico law places an even heavier burden on interstate commerce than the Connecticut law.

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[7] Both the 1979 law and the 1981 amendments have extraterritorial effects on malt beverage pricing. Although the original affirmation requirement differed from that now in effect, even before the 1981 amendments brewers and importers selling in New Mexico were constrained in deciding whether competitively to lower their prices in other states by the impact of any reduction on the prices they would have to charge in New Mexico.

2. These appellants, as plaintiffs below and (many of them) as plaintiffs in the *Healy* case, urged that the New Mexico and Connecticut price affirmation statutes were unconstitutional because they burdened and discriminated against interstate commerce and because they were preempted by supreme Federal law, in particular the Sherman Act, 15 U.S.C. § 1, and the Robinson-Patman Act, 15 U.S.C. § 13. The court of appeals in *Healy* did not need to reach these claims because it correctly saw the Connecticut statute as an impermissible direct regulation of commerce in other states. These further claims, if reached, pose most substantial Commerce Clause and Supremacy Clause issues.

In New Mexico, as in Connecticut, all the beer that is consumed flows into the state from outside it, both from other states and from abroad. The question whether a state, acting for the professed benefit of in-state wholesalers, can burden the business of out-of-state brewers and importers with a price affirmation requirement is plainly substantial. *See Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). So is the question raised by the claim that, like the California resale price maintenance statute in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), price affirmation statutes are invalid under the Supremacy Clause because they exert the power of the state to compel price-fixing arrangements that would be *per se* violations of the Sherman Act if entered into voluntarily. *See Sugar Institute, Inc.* v. *United States*, 297 U.S. 553 (1936).

3. In rejecting both the Commerce Clause and antitrust preemption arguments advanced by appellants, the

court below relied on *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35 (1966). That reliance was misplaced. *Seagram* does not even pertain to the New Mexico price affirmation law in effect now and ever since the 1981 amendments, and it does not sustain the constitutionality of the former law adopted in 1979.

It is true that the New York price affirmation law involved in *Seagram*, applicable solely to distilled spirits, was in some respects similar to the New Mexico law originally made applicable to malt beverages in 1979. As the New York statute required of distillers, the 1979 law required brewers and importers to affirm that the prices they charged in New Mexico were not higher than the lowest prices they charged in any other state during the preceding month. But the 1979 New Mexico law was repealed in 1981. *Seagram* does not govern the validity of the current New Mexico price affirmation law, any more than it governed the validity of the Connecticut law involved in *Healy*.

Nor can *Seagram* properly be construed as holding that every state price affirmation statute that is geared to previous-month prices will necessarily withstand constitutional challenge. The Court expressly stated in *Seagram* that it "need not now decide whether . . . [such a law] could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause." 384 U.S. at 42-43. In upholding the New York statute, the Court noted a number of significant considerations that are not present here. In the first place, *Seagram* involved distilled spirits, which are quite different from malt beverages in the way they are produced and marketed and thus in the Commerce Clause and Sherman Act implications of

marketing restrictions.[8] That case also involved uniquely potent regulatory interests on the side of the enacting state, as revealed in the Court's extended discussion of the legislative history of the "sweeping redirection of New York's policy regulating the sale of liquor in the State." 384 U.S. at 38-41.[9] Moreover, contrary to the decision below (App. 9b), *Seagram* does not preclude "application of appropriate Commerce Clause analysis" in all cases in which enforcement of the challenged law has been stayed pending litigation. This Court has often considered the impact on interstate commerce of state statutes that had not yet been enforced. *E.g.*, *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520 (1959).

Finally, it should be noted that much has happened to the law of the Twenty-first Amendment, the Commerce Clause and Sherman Act preemption since this Court decided *Seagram*. In an appropriate case, this Court may wish to reconsider *Seagram* in light of its more recent decision in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and other developments affecting the relationship between state

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[8] For example, in assessing the burden on interstate commerce, this Court in *Seagram* relied to some extent on the fact that the regulatory procedure under New York law was "comparable to" but less onerous than procedures in 17 other states "in which liquor is sold by the State itself and not by private enterprise." 384 U.S. at 43-45. In contrast, there are no states that have a monopoly on the sale of malt beverages. *See also* 384 U.S. at 49 (describing structure of the liquor industry).

[9] The Court in *Seagram* also relied on a narrow construction of part of the challenged statute by the state's highest court. 384 U.S. at 51-52. Here the New Mexico Supreme Court did not clearly express any interpretation of either the 1979 law or the 1981 amendments.

and federal power in the regulation of the trade in alcoholic beverages.[10]

II. The Court Below Did Not Consider The Impact Of The Repeal Of The 1979 Law Or Interpret Or Otherwise Rule Upon Its Successor.

In grounding its Federal constitutional decision on *Seagram*, the court below proceeded on the palpably erroneous premise that "no material distinction exists" between the New York statute involved in *Seagram* and the New Mexico price affirmation law. (App. 11b). There are significant distinctions between the New York law and the New Mexico law, as amended in 1981. In particular, the New York law was expressly geared to prices charged in the previous month, and the current New Mexico law is not.[11] The court below was made aware of the 1981 amendments. In footnotes to its opinion the court took note of the fact of the amendments, but in the body of its opinion the court appears to have overlooked the amendments' contents. (p. 8, *supra.*)

There are three possible explanations of this puzzling aspect of the New Mexico court's opinion. One is that the court regarded the 1981 amendments as irrelevant to the appeal before it, which was from a decision sustaining the constitutionality of the 1979 law. However, that would

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[10] If, instead of vacating the judgment below and remanding the case, as we suggest, the Court notes probable jurisdiction, appellants will argue that *Seagram* does not apply to the New Mexico price affirmation law and, if applicable, does not support the validity of the challenged state law. Appellants also reserve the right to argue that *Seagram* should be reconsidered.

[11] As noted above, pp. 14-15, the New Mexico court's reliance on *Seagram* was also misplaced with respect to the former, previous-month, affirmation law.

seem an unlikely approach in a case in which only injunctive and declaratory relief was sought. Moreover, this interpretation is inconsistent with the court's concluding statement that appellants "are not precluded from bringing a future action upon the showing that its case has become 'concrete', henceforth from this determination." (App. 14b.) If the court believed the case involved only the validity of a statute that was repealed in 1981, it would not have suggested that appellants might develop a "concrete case" based on future enforcement of the statute.[12]

A second possible explanation is that as a matter of state law the court construed the 1981 amendments as not differing substantially from the 1979 law. That possibility also seems remote, however, in light of the obvious difference between the amended and the unamended statute. This Court should not assume that such an interpretation was intended absent any clear indication to that effect in the opinion below.

The third possibility is that, even though the 1981 amendments were called to the court's attention, the court did not sufficiently focus on the nature of the amendments to appreciate that the statute had been not merely recodified but substantially changed. That seems to us the most likely explanation.

Whatever the explanation, we cannot expect this Court to confront the substantial constitutional issues that are

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[12] If the case below had been limited to the 1979 law, it is arguable that the 1981 amendments would not render the case moot. Appellants' potential liabilities under the bonds executed in connection with the district court's injunction against enforcement of the statute could be found to turn on a final adjudication of the validity of the statute originally challenged.

posed by the former New Mexico price affirmation law that was repealed in 1981 without a clear indication from the New Mexico Supreme Court as to the continuing relevance of that statute. But neither can we ask the Court to consider the substantial constitutional questions that affect the validity of the current New Mexico statute, as amended in 1981, until it learns from the New Mexico Supreme Court what that statute means and whether its validity is properly in issue in this case.

Before this Court undertakes review of the serious constitutional issues posed by the New Mexico price affirmation law, it should accord the highest court of that state the opportunity to reconsider and clarify the meaning and status of that law, including the significant 1981 amendments which were apparently overlooked in the body of the opinion below. Moreover, apart from state law questions, the New Mexico court should have the chance in the first instance to consider the validity of the New Mexico price affirmation law in the light of this Court's decision in *Healy*, which was not before the court below when it decided this case.

CONCLUSION

It is respectfully submitted that the judgment of the New Mexico Supreme Court should be vacated and the case should be remanded for further consideration in light of the 1981 amendments to the New Mexico price affirmation law and this Court's decision in *Healy* v. *United States Brewers Ass'n*, No. 82-1493, 52 U.S.L.W. 3308 (Oct. 17, 1983).

Respectfully submitted,

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December 2, 1983

APPENDIX A

Listing Required by Rule 28.1 of Appellants and Their Parent Companies, Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates

Appellant United States Brewers Association, Inc., is comprised of the following member corporations: Adolph Coors Company; Anheuser-Busch, Inc.; Christian Schmidt Brewing Company; Latrobe Brewing Company; Pabst Brewing Company; The F. & M. Schaefer Brewing Company; Jos. Schlitz Brewing Company; and Stroh Brewery Company.

The parent companies, subsidiaries (other than wholly-owned) and affiliates of each member of the United States Brewers Association, Inc., and of each individual corporate appellant are listed below, based on information provided by each company:

Adolph Coors Company

None

Anheuser-Busch, Inc.

Parent—Anheuser-Busch Companies, Inc.

Subsidiaries and Affiliates—St. Louis National Baseball Club, Inc.; Busch Properties, Inc.; Consolidated Farms, Inc.; Metal Container Corporation; Kingsmill Realty, Inc.; St. Louis Refrigerator Car Company; Manufacturer's Railway Co.; Manufacturer's Cartage Co.; M.R.S. Redevelopment Corporation; M.R.S. Transport Company; Williamsburg Transport, Inc.; Fairfield Transport, Inc.; Busch Entertainment Corp.; Kingsmill Resorts, Inc.; Container Recovery Corporation; Metal Label Corporation; International Label Company; Busch Creative Services Corporation; Sesame Place, Inc.; Anheuser-Busch International Finance N.V.; Carolina Peanuts of Robersonville, Inc.; Golden Eagle Distributing Co.; Busch Agricultural Resources, Inc.; Busch Industrial Products Corporation; Anheuser-Busch International, Inc., Anheuser-Busch Europe, Inc.; AB Subsidiary, Inc.

Christian Schmidt Brewing Company

None

G. Heileman Brewing Company, Inc.

None

Jos. Schlitz Brewing Company

Parent—Stroh Brewery Company

Affiliates—LaCruz Del Campo S.A., Henninger Espanola S.A.

Latrobe Brewing Company

None

Miller Brewing Company

Parent—Philip Morris Incorporated

Olympia Brewing Company

Parent—Pabst Brewing Company

Pabst Brewing Company

Affiliate—Olympia Brewing Company

Stroh Brewery Company

Affiliates—The F. & M. Schaefer Brewing Company, Jos. Schlitz Brewing Company

The Guiness-Harp Corporation

Parent—Arthur Guiness & Sons, P.L.C., London, England

The F. & M. Schaefer Brewing Company

Parent—Stroh Brewery Company

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 13,053

UNITED STATES BREWERS ASSOCIATION, INC., ADOLPH COORS COMPANY, STROH BREWERY COMPANY, F & M SCHAEFER BREWING COMPANY, ANHEUSER-BUSCH, INC., MILLER BREWING COMPANY, OLYMPIA BREWING COMPANY, G. HEILEMAN BREWING COMPANY and PABST BREWING COMPANY,

Plaintiffs-Appellants,

and

THE GUINESS-HARP CORPORATION,

Plaintiff-in-Intervention-Appellant,

vs.

DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

Defendant-Appellee.

Filed July 21, 1983

Appeal From The District Court Of Santa Fe County
Lorenzo F. Garcia, District Judge

Rodey, Dickson, Sloan, Akin & Robb
William S. Dixon
Albuquerque, New Mexico

Freedman, Boyd & Daniels
Charles W. Daniels
Albuquerque, New Mexico *for Appellants*

Paul Bardacke, Attorney General
Arthur J. Waskey
Herbert M. Silverberg, Assistant Attorneys General
Santa Fe, New Mexico *for Appellee*

OPINION

RIORDAN, Justice.

United States Brewers Association, Inc., Adolph Coors Company, Joseph Schlitz Brewing Company, Anheuser-Busch, Inc., Miller Brewing Company, Olympia Brewing Company, G. Heileman Brewing Company and Pabst Brewing Company (Brewers) filed a declaratory action against the Director of the New Mexico Department of Alcoholic Beverage Control (Director), in which Guiness-Harp Corporation intervened, challenging the constitutionality of the 1979 amendment to the Discrimination in Selling Act, NMSA 1978, Sections 60-12-1 through 60-12-10 (Act).[1] Upon motion, the trial court granted Brewers a preliminary injunction against the enforcement of the Act on the condition that they execute bonds, binding themselves to pay the difference between the prices at which the products were sold during the pendency of the injunction and the prices at which the Act would have required them to be sold under the Act. Director filed a motion for summary judgment which was opposed by Brewers, who filed counter-affidavits to the motion. Director's motion for summary judgment was granted. Brewers appeal. We affirm and remand.

The issues on appeal are:

I. Whether the 1979 amendment to the Act was unconstitutional for failure to properly contain the subject of the 1979 amendment in the title of the Act.

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[1] The Act has since been repealed, amended, re-codified and is included in the Liquor Control Act, NMSA 1978, Sections 7-9-80.1, 7-17-5, 7-24-1, 60-3A-1 through 60-3A-5, 60-4B-1 through 60-4B-8, 60-4C-1 through 60-4C-3, 60-5A-1, 60-5A-2, 60-6A-1 through 60-6A-20, 60-6B-1 through 60-6B-18, 60-6C-1 through 60-6C-9, 60-7A-1 through 60-7A-25, 60-7B-1 through 60-7B-11, 60-8A-1 through 60-8A-19 (Repl.Pamp.1981 and Cum.Supp.1982). The Act has become known as the "price affirmation law."

II. Whether the Act imposes an undue burden on interstate commerce.

III. Whether the Act requires price-fixing that is unlawful under federal antitrust laws.

IV. Whether the Act is in violation of the police powers of New Mexico.

Facts

The Act was originally passed in 1967 and applied to the sale of "alcoholic liquor" as defined in the Liquor Control Act, which excluded brewed products. The prohibition under the Act was that no brand of "alcoholic liquor" could be sold by manufacturers to New Mexico liquor wholesalers (Wholesalers) at any price higher than the price sold to any other liquor wholesaler anywhere in the United States or District of Columbia.

During the 1979 legislative session, House Bill 278 was enacted as 1979 N.M. Laws, ch. 83, and specifically read:

> AN ACT RELATING TO ALCOHOLIC LIQUORS; AMENDING THE DISCRIMINATION IN SELLING ACT.
>
> BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:
>
> Section 1. Section 60-12-2 NMSA 1978 (being Laws 1967, Chapter 269, Section 2) is amended to read:
>
> "60-12-2. FILING OF SCHEDULES REQUIRED.—No brand of alcoholic liquor shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a schedule is filed with the director of the department of alcoholic beverage control and is then in effect. For the purposes of the Discrimination in Selling Act, "alcoholic liquor" means alcoholic liquor as defined in Section 60-3-1 NMSA 1978."

The effect of this amendment was to extend the price affirmation law to brewed products which had previously been excluded under the definition of "alcoholic liquor."

I. Subject Of The Amendment

Brewers claim that the purpose and effect of the amendatory language of House Bill 278 were concealed from the Legislature, the administration and those affected by the law. Therefore, Brewers argue that House Bill 278 failed to comply with the mandatory notice requirements of N.M. Const. art. 4, Sections 16 and 18. We disagree.

Section 16 provides in pertinent part:

> The subject of every bill shall be clearly expressed in its title . . . but if any subject is embraced in any act which is not expressed in its title, only so much of the act as is not so expressed shall be void. . . .

Section 18 provides in pertinent part:

> No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended or extended shall be set out in full. . . .

(a) Legislative intent

In an attempt to show legislative intent, Brewers introduced affidavits at trial from chairmen of legislative committees claiming that they did not know the effect of House Bill 278, and that if they would have known the effect of House Bill 278, then they would have held hearings. The propriety of admitting a legislator's testimony to determine legislative intent was addressed in *State v. Turley*, 96 N.M. 592, 633 P.2d 700 (Ct.App.1980), *rev'd*, 96 N.M. 579, 633 P.2d 687 (1981). The Court of Appeals' opinion held that "a legislator's testimony, either as committee member or legislative member, generally is not competent evidence as to the intent of the legislative body enacting a measure." *Id.* at 597, 633 P.2d 705 (citations omitted). However, we then overruled the Court of Appeals' opinion and found that "there [was] insufficient evidence in the record upon which the Court of Appeals could predicate a general principle of law that a legislator's testimony is not competent evidence as to the intent of the legislative body enacting a measure. . . ." *Id.* at 581, 633 P.2d at 689.

We now agree with the statement by the Oklahoma Supreme Court in *Haynes v. Caporal*, 571 P.2d 430, 434 (Okl.1977) (citations omitted) (emphasis added), referred to by the Court of Appeals in *Turley*, that:

> At trial, legislative intent . . . was sought to be established through the testimony of an individual senator and house member at the time of [the bill's] passage. *This court is not bound, and need not consider such evidence. Testimony of individual legislators or others as to happenings in the Legislature is incompetent, since that body speaks solely through its concerted action as shown by its vote.*

Similarly, as addressed in Annot., 70 A.L.R. 5 (1931), in determining legislative intent it is proper to look to the legislative history of an act or contemporaneous statements of legislators while the legislation was in the process of enactment. Statements of legislators, *after* the passage of the legislation, however, are generally not considered competent evidence to determine the intent of the legislative body enacting a measure. *See, e.g., County of Washington, Oregon v. Gunther*, 452 U.S. 161, 176 n.16 (1981); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 N.39 (1977); *see also* Annot. 56 L.Ed.2d 918 (1979).

In New Mexico, legislative intent must be determined primarily by the *legislation itself. State v. McHorse*, 85 N.M. 753, 517 P.2d 75 (Ct.App.1973); *Santa Fe Downs, Inc. v. Bureau of Revenue*, 85 N.M. 115, 509 P.2d 882 (Ct.App.1973). Therefore, we adopt the Court of Appeals' reasoning and holding in *Turley*. To the extent that our opinion in *Turley* may be construed as inconsistent with this holding, our opinion is expressly overruled.

(b) Constitutionality

We have long held that the test of a statute's constitutional validity under Section 16 is whether the title fairly gives such reasonable notice of the subject matter of the statute itself as to prevent the mischief intended to be guarded against. *State v.*

Ingalls, 18 N.M. 211, 135 P. 1177 (1913). The mischief, which is to be guarded against, is "hodge-podge or log-rolling legislation, surprise or fraud on the legislature, or not fairly apprising the people of the subjects of legislation so that they would have no opportunity to be heard on the subject." *Martinez v. Jaramillo*, 86 N.M. 506, 508, 525 P.2d 866, 868 (1974) (citations omitted). When applying this test on appeal, we will indulge every presumption in favor of the legislation's validity. *Id.* Furthermore, each case must be decided on its own facts and circumstances. *State v. Gomez*, 34 N.M. 250, 280 P. 251 (1929).

As a result of previous rulings by this Court, the Legislature has made it a policy to insure that the title of an act is stated in broad terms. *See, e.g. Bureau of Revenue v. Dale J. Bellamah Corp.*, 82 N.M. 13, 474 P.2d 499 (1970); *First Thrift and Loan Association v. State*, 62 N.M. 61, 304 P.2d 582 (1956). The title, however, need not set forth details of an enactment. *City of Albuquerque v. Garcia*, 84 N.M. 776, 508 P.2d 585 (1973). If the subject matter of the bill is reasonably germane to the title of the act, it is sufficient to be valid under Section 16. *In re Investigation No. 2 of the Governor's Organized Crime Prevention Commission*, 91 N.M. 516, 577 P.2d 414 (1978); *see also State ex rel. Salazar v. Humble Oil & Refining Co.*, 55 N.M. 395, 234 P.2d 339 (1951). Likewise, we have held that the fact that an act may amend certain provisions of other statutes by implication, does not in and of itself violate Section 18. *State ex rel. Taylor v. Mirabal*, 33 N.M. 553, 273 P. 928 (1928).

In the present case, House Bill 278 was very simple. It consisted of two paragraphs on one page and made two changes to the Act. The first change was to substitute the name of the person with whom reports must be filed from the "chief of the liquor division" to the "director of the department of alcoholic beverage control." The second change was to alter the definition of "alcoholic liquor" from "Spirituous Liquor" to "alcoholic liquor" as defined in the Act. The effect of this change clearly was to make brewed products subject to the Act, just as other alcoholic beverages had been previously. Having reviewed House Bill 278, we determine that its title did not fail to give

reasonable notice of the subject matter of the amendment. The title does not violate Section 16. Furthermore, we determine that the amendment's reference to the definitions in NMSA 1978, Section 60-3-1,[2] does not violate Section 18. We therefore hold that House Bill 278 was sufficient to meet our constitutional standards.

II. Undue Burden On Interstate Commerce

Brewers claim that the trial court erred in granting summary judgment against them because the application of the Act imposed an undue interference with interstate commerce in violation of Article 1, Section 8, Clause 3 of the United States Constitution. For example, Brewers assert that strong competition in various regions of the country will require them to cut prices to meet competition in those regions. To require them to cut prices across the country to meet regional competition would result in an unreasonable burden on interstate commerce. Brewers also claim that the Act, in effect, would require all brewers to adopt an FOB (free on board) pricing system and that they would not be allowed to charge a "delivered price." The Act would increase prices to wholesalers, retailers and consumers in transshipped states since it forbids price reduction based on increased freight. It also would prohibit the discounting of distressed beer which must be sold before the shelf life affects its quality. Therefore, Brewers argue that the effect of the law is extra-territorial and burdens interstate commerce between the transshipping and the transshipped states, and that the trial court improperly granted summary judgment on the issue of whether the Act imposes an unreasonable burden on interstate commerce. We disagree.

The Twenty-first Amendment to the United States Constitution grants each state broad regulatory power over liquor traffic within its borders. *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945). Although the Twenty-first

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[2] Presently compiled as NMSA 1978, Section 60-3A-3 (Repl.Pamp.1981).

Amendment does not overrule the Constitution's Commerce Clause, "each must be considered in the light of the other, and in the context of the issues and interests at stake in any *concrete case.*" *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964) (emphasis added).

In granting summary judgment, the trial court followed the reasoning in the United States Supreme Court case of *Joseph E. Seagram & Sons v. Hostetter, Chairman, New York State Liquor Authority*, 384 U.S. 35 (1966).[3] In *Seagram*, after reviewing constitutional arguments comparable to the constitutional challenges raised by Brewers, the Court rejected a facial attack upon Section 9 of New York's Alcoholic Beverage Control Law (New York's Section 9). A comparison of New York's Section 9 and the Act indicates an indistinguishable price affirmation setting. Both require wholesalers and retailers to file monthly price schedules with the respective state liquor authority accompanied by an affirmation that prices charged are no higher than the lowest price at which sales are made anywhere in the United States during the preceding month.

In considering a Commerce Clause attack, the Court held that under the Twenty-first Amendment this particular method of regulation was valid on its face and *not* an unconstitutional burden on interstate commerce since the enforcement of the price affirmation law was stayed throughout the litigation. Specifically on the Commerce Clause argument, the Court reiterated its previous position that " 'a State is totally unconfined by traditional Commerce Clause limitation when it

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[3] New York's price affirmation law initially was upheld constitutionally by the New York Supreme Court, Albany County, 45 Misc.2d 956, 258 N.Y.S.2d 442 (1965); then affirmed by the New York Supreme Court, Appellate Division, Third Judicial Department, 23 A.D.2d 933, 259 N.Y.S.2d 644 (1965); and thereafter affirmed by the Court of Appeals of New York, 16 N.Y.2d 47, 209 N.E.2d 701 (1965), before review was granted by the United States Supreme Court.

restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' " *Seagram*, 384 U.S. at 42 (quoting *Idlewild*, 377 U.S. at 330 (1964)). The Court therefore determined that in relationship to the Commerce Clause, nothing in previous cases decided under Commerce Clause analysis would require a ruling that the New York's Section 9 was unconstitutional.

In the more recent case of *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) (citation omitted) (emphasis added), the Court relied on the *Idlewild* concept of a "concrete case" and stated:

> The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. *The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'*

The present case is not a "concrete case" because the enforcement of the Act and House Bill 278 with respect to Brewers was enjoined throughout the litigation. Application of appropriate Commerce Clause analysis would be too speculative. While a statute that is constitutional on its face can be unconstitutional in its application, we find that in the present case the trial court properly granted summary judgment. Therefore, we agree with the trial court's reading of *Seagram* that on its face the Act does not impose an unreasonable burden on interstate commerce.

III. Antitrust Laws

Brewers argue that the Act requires them to engage in price discrimination and to establish interstate price-fixing in violation of federal antitrust laws, specifically the Sherman Act, 15 U.S.C. Sections 1 through 7 (1976), and the Robinson-Patman Act, 15 U.S.C. Section 13 (1976). We disagree.

The United States Supreme Court in *Seagram* specifically found no concerted anticompetitive conduct required for violation of federal antitrust laws. The Court stated:

> The bare compilation, without more, of price information on sales to wholesalers and retailers to support the affirmations filed with the State Liquor Authority would not of itself violate the Sherman Act. . . . Section 9 imposes no irresistable economic pressure on the appellants to violate the Sherman Act in order to comply with the requirements of § 9. On the contrary, § 9 appears firmly anchored to the assumption that the Sherman Act will deter any attempts by the appellants to preserve their New York price level by conspiring to raise the prices at which liquor is sold elsewhere in the country.
>
> Although it is possible to envision circumstances under which price discriminations proscribed by the Robinson-Patman Act might be compelled by § 9, the existence of such potential conflicts is entirely *too speculative* in the present posture of this case. . . .

Id. at 45-46 (citations omitted) (emphasis added).

More recently, the United States Supreme Court again reviewed whether an alcoholic beverage control law violated federal antitrust laws and relied heavily on the *Seagram* case as authority in deciding *Rice v. Norman Williams Co.*, ___ U.S. ___, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982). In *Rice*, the Court stated that:

> In determining whether the Sherman Act preempts a state statute, we apply principles similar to those which we employ in considering whether any state statute is preempted by a federal statute pursuant to the Supremacy Clause. As in the typical preemption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute. *A state regulatory scheme is not preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the*

> *federal antitrust laws simply because the state scheme might have an anticompetitive effect. . . .*
>
> *A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy.*

Id. at ____, 102 S.Ct. at 3299, 73 L.Ed.2d at 1049-1050 (citations omitted) (emphasis added). The Court thereafter held that:

> Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

Rice, ____ U.S. at ____, 102 S.Ct. at 3300, 73 L.Ed.2d at 1051.

Inasmuch as no material distinction exists between the York's Section 9 and the Act, we determine that the holdings in *Seagram* and *Rice* are controlling and that it is unnecessary for us to engage in the hypotheticals presented by Brewers on this point. A statute dealing with the regulation of alcoholic beverages, such as the price affirmation law presented in this case, cannot be constitutionally condemned in the abstract. If legislation is not a "*per se* violation" of federal antitrust laws, we will not engage in constitutional analysis unless and until a "concrete case" is engendered from a specific application of the legislation. In other words, if legislation is constitutional on its face, then it will remain constitutional until such time as there is specific enforcement experience that will give us a body of

historical facts upon which we can base a proper judgment, as opposed to an inappropriate decision based on hypotheticals, assumed facts or potential conflicts. *Rice v. Norman Williams, Co.; California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.; Joseph E. Seagram & Sons v. Hostetter, Chairman New York State Liquor Authority.*

IV. State's Police Power

Brewers claim that the trial court erred in denying them an opportunity to prove that the statutory scheme of the Act had the effect of dictating price-fixing, without any substantial relation to the public health, safety or general welfare. Brewers therefore argue that the Act amounts to a preferential price-fixing scheme which is an improper exercise of New Mexico's police power in violation of N.M. Const. art. 2, Sections 4 and 18. We disagree.

Section 4 provides in pertinent part:

> All persons . . . have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property. . . .

Section 18 provides in pertinent part:

> No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. . . .

We have held that if the manufacture and sale of liquor is lawful, then statutes which provide for the regulation of the business are limited by constitutional guarantees and must fall within the proper exercise of New Mexico's police power. *Drink, Inc. v. Babcock*, 77 N.M. 277, 421 P.2d 798 (1966). In determining whether a statute amounts to a proper exercise of police power, courts must indulge every presumption in favor of the validity of the legislation. "[T]he state may adopt an economic policy reasonably deemed to promote the public welfare, and may enforce such a policy by appropriate legislation without contravening due process so long as such legislation

has a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory." *Id.* at 280, 421 P.2d at 800 (citation omitted).

The legislation reviewed in *Drink, Inc.*, specifically delegated and permitted manufacturers the power to contractually fix the minimum price for their product at the retail level. In *Drink, Inc.*, we held that the fair-trade contract and markup provisions of the Liquor Control Act constituted unreasonable legislation, and was not an appropriate exercise of New Mexico's police power. In so holding, we stated that:

> We want to make it clear that the legislature has the power to act on the subject of below-cost sales and their effect on free competition, and may adopt legislation relating to the establishing of prices on alcoholic beverages with the view and purpose of regulating and controlling the liquor business in the interest of the public welfare. *We are here only concerned with the fair-trade contract and mandatory uniform markup provisions discussed. The police power was not validly exercised in the enactment of these specific provisions.*

Id. at 284, 421 P.2d at 803 (emphasis added).

In marked contrast, the Act does not permit Brewers to establish the minimum wholesale or retail prices of their beer through "non-signor" or "vertical agreements" provisions as was the case in *Drink, Inc.* Instead, the Act requires Brewers to sell their products to Wholesalers at a price "no higher than the lowest price at which such item of liquor was sold by the brand owner, or any related person, to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state or state agency which owns and operates retail liquor stores" during the immediate preceding calendar month. NMSA 1978, § 60-12-6.[4]

In reviewing a comparable constitutional argument, the United States Supreme Court in *Seagram* specifically rejected

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[4] Presently compiled as NMSA 1978, Section 60-8A-15 (Repl. Pamp. 1981).

assertions that New York's Section 9 violated due process and equal protection clauses of the Fourteenth Amendment. The Court stated:

> We cannot say that the legislature acted unconstitutionally when it determined that only by imposing the relatively drastic 'no higher than the lowest price' requirement of § 9 could the grip of the liquor distillers on New York liquor prices be loosened. (Footnote omitted.) In a variety of cases in areas no more sensitive than that of liquor control, this Court has upheld state maximum price legislation.

Id. at 48 (citations omitted). By virtue of the Twenty-first Amendment, the states have been conferred with something more than a nominal degree of authority over public health, welfare and morals when they act to regulate the liquor business. In light of this authority, the Act is neither arbitrary nor discriminatory. Therefore, we hold that the Act does not violate the police powers of New Mexico.

CONCLUSION

We determine that the trial court did not err in deciding that no genuine issues of fact exist because the enactment of House Bill 278 satisfies constitutional requirements, and because the Act, as amended, is constitutionally valid on its face. The United States Supreme Court cases of *Rice*, *Midcal*, *Seagram* and *Idlewild* are controlling and dispositive of the specific constitutional challenges raised by Brewers. On remand, the trial court shall determine the Wholesalers' appropriate shares of the bonds posted by Brewers. Brewers, however, are not precluded from bringing a future action upon the showing that its case has become "concrete", henceforth from this determination.

The trial court's entry of summary judgment is affirmed. This case is remanded to the trial court for proceedings not inconsistent with this opinion.

IT IS SO ORDERED.

WILLIAM RIORDAN, Justice

WE CONCUR:

WILLIAM R. FEDERICI, Justice

THOMAS A. DONNELLY, Judge, sitting by designation.

APPENDIX C

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO COUNTY OF SANTA FE

No. 79-1139

UNITED STATES BREWERS ASSOCIATION, INC.,
ADOLPH COORS COMPANY, JOS SCHLITZ
BREWING COMPANY, ANHEUSER-BUSCH, INC.,
MILLER BREWING COMPANY,
OLYMPIA BREWING COMPANY,
G. HEILEMAN BREWING COMPANY and
PABST BREWING COMPANY,

Plaintiffs,

vs.

JIM BACA, Director of the New Mexico
Department of Alcoholic Beverage Control,

Defendant.

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80 JAN 7 PM 3 21
Filed in Clerk's Office
Of District Court
Dolores Lujan, Clerk

MEMORANDUM OPINION

The issues before the Court raise significant legal questions, not factual ones. Summary judgment is proper when the pleadings and evidence in form of depositions, admissions, affidavits and documents attached to affidavits show that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law.

Plaintiffs filed suit seeking injunctive relief and a declaratory judgment that House Bill 278, (§ 60-12-2 N.M.S.A.) is violative of constitutional provisions which require that the subject of a bill be expressed in its title. Further, it is alleged that the

statute is vague and ambiguous. Plaintiffs urge that the entire "price fixing scheme" be set aside because it is arbitrary and not reasonably related to a proper legislative purpose. Plaintiffs contend that the statute violates due process, equal protection and the supremacy clause of the U.S. Constitution, and finally, Plaintiffs contend that enforcement of the law will place an impermissible burden on interstate commerce.

New Mexico has for some years maintained a price affirmation law which required producers of spiritous liquor to file with the Department of Alcohol Beverage Control an affirmation that the prices of the products sold to New Mexico wholesalers are no greater than the prices charged any other wholesaler in the United States. Prior to the 1979 legislative session, this law applied only to producers of "spiritous liquor" which by statutory definition, meant all alcoholic liquor except beer, wine and ale.

During the most recent session, House Bill 278 was introduced. This bill was captioned: Relating To Alcoholic Liquors; Amending The Discrimination In Selling Act.

The bill deleted the term "spiritous liquor" and inserted in lieu thereof, the term "alcoholic liquor." The effect of this amendment was to broaden the applicability of the law from spiritous liquor to all alcoholic liquor, and thereby require producers of beer, wine and ale to comply with the affirmation procedures.

Plaintiffs contend that neither the legislature nor the public had proper notice of the bill's intent. The crux of the question is whether the subject of the bill was sufficiently expressed in the title so as to meet constitutional requirements.

As early as 1913 our Supreme Court determined the test to be applied in scrutinizing alleged violations of Article IV, Section 16. The test is simple. Does the title give reasonable notice of the subject matter of the statute? The question is not whether any particular person received actual notice, or whether any particular person had a clear understanding of the

proposed law, but only whether the title gave reasonable notice.

House Bill 278's title states that it relates to alcoholic liquors; the title indicates that amendments to the Discrimination in Selling Act are sought. The title is not ambiguous; it specifically gives notice that it relates to alcoholic liquor. The title is not so limited that one would be mislead *[sic]*. The amendment in the bill accomplishes what the title announced; the Discrimination in Selling Act is amended by removing the term "spiritous liquor" and inserting "alcoholic liquor." The title meets constitutional standards and gives fair and reasonable notice of its subject. Accordingly, it is immaterial that Plaintiffs or individual legislators failed to receive actual notice. (Note: the Court will not consider the sections of Plaintiff's *[sic]* affidavits that would have been inadmissible in evidence at a trial). The standard is one of reasonableness, and the failure of specific individuals to take notice does not overcome the presumption of constitutionality.

Plaintiffs challenge the law by asserting that the legislature passed House Bill 278 without a clear understanding of its import or affect *[sic]* on liquor producers nationwide. Plaintiffs state that this is bad legislation, and attempts to pass such laws have been defeated elsewhere. It is alleged that the bill provides no substantial benefit to consumers, and in fact, may be to their detrement *[sic]*.

These arguments should properly have been raised in public debate on the bill. The basis of our government, stated Thomas Jefferson, is the opinion of the people. That opinion should be made known to those considering the enactment of our laws, and the proper forum to raise the issues noted by Plaintiffs was in the legislature.

The Court will not substitute its judgment for the collective wisdom of the legislature in determining whether specific laws are needed or are ill-advised. As elected representatives of the citizenry, the legislature enacts laws that are believed necessary and repeals those that are not. In a democratic society,

legislative decisions should reflect the views of the majority. It is presumed that this law reflects the will of the people. While courts do not substitute their economic and social beliefs for the legislature's courts will interpret laws passed to determine whether they are constitutionally sound.

Plaintiffs challenge the soundness of the law by asserting that the "price-fixing scheme" contemplated by the statute is an impermissible use of a state's power.

In December of 1933 the Twenty-First Amendment to the United States Constitution was ratified. This amendment gives states power to control the delivery and usage of alcoholic liquors. Pursuant to that authority states have exercised broad police powers in regulating the production, sales and consumption of alcohol. In *Drink, Inc., vs. Babcock;* 77 N.M. 227, 421 P.2d 798, our court stated:

> "We recognize that the legislature has the power not only to regulate the sale of alcoholic beverages, not to surpress *[sic]* it entirely, and may impose on the liquor industry more stringent regulations than on other businesses."

The Court pointed out that regulation of business interests, even in these areas where the state has broad authority, is limited by constitutional guarantees.

Inasmuch as this Court has already determined that the House Bill was constitutional on its face, and further, that the State can properly regulate this industry in the exercise of its police power, the inquiry turns to the question of whether constitutional guarantees have been violated.

Each of the constitutional arguments that have been raised by the Plaintiffs were previously argued to the United States Supreme Court following New York's enactment of a substantially similar price affirmation law. In *Joseph E. Seagrams & Sons vs. Hostetter*, 384 U.S. 35, 16 L.Ed.2d 236, the Court considered and rejected the arguments raised by the Plaintiff *Seagram*, and noting that the case at bar is in the same posture as the *Hostetter* case, there is no cause to depart from the analysis made by the U.S. Supreme Court. The Supreme

Court found that New York's laws which would allegedly interfere with Plaintiff's pricing policies in other states was not sufficient to invalidate the pricing scheme. Such laws were found to constitute a reasonable exercise of a State's rights under the Twenty-First Amendment. Similarly, the Court considered and rejected the claim that the state's law conflicted with federal statutes, or with the Supremacy clause. The Court determined that the enactment and enforcement of New York's law violated neither due process nor equal protection.

Plaintiffs finally urge the Court to declare the price affirmation law void, alleging that it is ambiguous and vague. The argument revolves around the use of terms which traditionally have no application to beer.

Defendants *[sic]* affidavits show that no problems have been encountered by other producers in completing affirmation schedules, and that those terms that have no application to beer and ale have simply been designated as "not applicable." The Court does not find ambiguity or vagueness that would compel the grant of relief prayed for by Plaintiffs.

Having determined that those issues are legal rather than factual, and determining that this is an appropriate case for the issuance of summary relief. The Court grants summary judgment to the Defendant.

LET JUDGMENT BE ENTERED ACCORDINGLY.

LORENZO F. GARCIA
District Judge

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Thursday, August 25, 1983

No. 13,053

UNITED STATES BREWERS ASSOCIATION, INC, *et al.*,
Plaintiffs-Appellants,
and THE GUINNESS-HARP CORPORATION,
Plaintiff-in-Intervention-Appellant,
vs.

JIM BACA, Director of the New Mexico
Department of Alcoholic Beverage Control,
Defendant-Appellee.

This matter coming on for consideration by the Court upon Motion of Appellants for Rehearing, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that Motion of Appellants for Rehearing is hereby denied.

ATTEST: A TRUE COPY

Rose Marie Alderete
ROSE MARIE ALDERETE
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX E

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

No. 13,053

UNITED STATES BREWERS ASSOCIATION, INC., ADOLPH COORS COMPANY, STROH BREWERY COMPANY, F & M SCHAEFER BREWING COMPANY, ANHEUSER-BUSCH, INC., MILLER BREWING COMPANY, OLYMPIA BREWING COMPANY, G. HEILEMAN BREWING COMPANY, and PABST BREWING COMPANY,

Plaintiffs-Appellants,

and

THE GUINESS-HARP CORPORATION,

Plaintiff-in-Intervention, Appellants,

vs.

JIM BACA, Director of the New Mexico Department of Alcoholic Beverage Control,

Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that United States Brewers Association, Inc., Adolph Coors Company, Stroh Brewery Company, F & M Schaefer Brewing Company, Anheuser-Busch, Inc., Miller Brewing Company, and G. Heileman Brewing Company, appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico entered on July 21,

1983 affirming the granting of summary judgment in favor of appellee on the complaint herein.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By William S. Dixon

WILLIAM S. DIXON
Attorneys for Plaintiff-Appellant
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Telephone: (505) 765-5900

FREEDMAN, BOYD & DANIELS, P.A.

By Charles W. Daniels

CHARLES W. DANIELS
Attorneys for Plaintiff-Appellants
United States Brewers Association, Inc., Adolph Coors Company, Stroh Brewery Company, F & M Schaefer Brewing Company, Anheuser-Busch Inc., Olympia Brewing Company, G. Heileman Brewing Company and The Guiness-Harp Corporation
20 First Plaza, Suite 212
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Telephone: (505) 842-9960

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

No. 13,053

UNITED STATES BREWERS ASSOCIATION, INC., ADOLPH COORS COMPANY, STROH BREWERY COMPANY, F & M SCHAEFER BREWING COMPANY, ANHEUSER-BUSCH, INC., MILLER BREWING COMPANY, OLYMPIA BREWING COMPANY, G. HEILEMAN BREWING COMPANY, and PABST BREWING COMPANY,
Plaintiffs-Appellants,

and

THE GUINESS-HARP CORPORATION,
Plaintiff-in-Intervention, Appellants,

vs.

JIM BACA, Director of the New Mexico Department of Alcoholic Beverage Control,
Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Guiness-Harp Corporation, appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico entered on July 21, 1983 affirming the granting of summary judgment in favor of appellee on the complaint herein.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

FREEDMAN, BOYD & DANIELS, P.A.

By Charles W. Daniels

CHARLES W. DANIELS
Attorneys for Plaintiff-Appellant
The Guiness-Harp Corporation
20 First Plaza, Suite 212
Albuquerque, New Mexico 87102
Telephone: (505) 842-9960

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

No. 13,053

UNITED STATES BREWERS ASSOCIATION, INC., ADOLPH COORS COMPANY, STROH BREWERY COMPANY, F & M SCHAEFER BREWING COMPANY, ANHEUSER-BUSCH, INC., MILLER BREWING COMPANY, OLYMPIA BREWING COMPANY, G. HEILEMAN BREWING COMPANY, and PABST BREWING COMPANY,
Plaintiffs-Appellants,

and

THE GUINESS-HARP CORPORATION,
Plaintiff-in-Intervention, Appellants,

vs.

JIM BACA, Director of the New Mexico Department of Alcoholic Beverage Control,
Defendant-Appellee.

CERTIFICATE OF SERVICE

William S. Dixon, counsel of record for Miller Brewing Company and Charles W. Daniels, counsel of record for United States Brewers Association, Inc., Adolph Coors Company, Stroh Brewery Company, F & M Schaefer Brewing Company, Anheuser-Busch, Inc. and G. Heileman Brewing Company certify that a true copy of Appellants' Notice of Appeal was served on all parties required to be served on this 6th day of October, 1983:

Andrea B. McCarty
Assistant Attorney General
Attorney for the Director of the New Mexico
Department of Alcoholic Beverage Control
P.O. Box 1508
Santa Fe, New Mexico 87504

by placing the same in an envelope properly addressed, with sufficient postage affixed thereto, and depositing the same in the United States Mail.

Service on Pabst Brewing Company, Olympia Brewing Company and The Guiness-Harp Corporation is not required since these parties are also represented by Charles W. Daniels.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By William S. Dixon

WILLIAM S. DIXON
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Miller Brewing Company
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FREEDMAN, BOYD & DANIELS, P.A.

By Charles W. Daniels

CHARLES W. DANIELS
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United States Brewers Association, Inc., Adolph Coors Company, Stroh Brewery Company, F & M Schaefer Brewing Company, Anheuser-Busch Inc., Olympia Brewing Company, G. Heileman Brewing Company and The Guiness-Harp Corporation
20 First Plaza, Suite 212
Albuquerque, New Mexico 87102
Telephone: (505) 842-9960

It is hereby certified that
a copy of the foregoing was
mailed to counsel of record
this 6th day of October, 1983

WILLIAM S. DIXON

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

No. 13,053

UNITED STATES BREWERS ASSOCIATION, INC.,
ADOLPH COORS COMPANY, STROH BREWERY
COMPANY, F & M SCHAEFER BREWING COMPANY,
ANHEUSER-BUSCH, INC., MILLER BREWING
COMPANY, OLYMPIA BREWING COMPANY,
G. HEILEMAN BREWING COMPANY, and
PABST BREWING COMPANY,
Plaintiffs-Appellants,

and

THE GUINESS-HARP CORPORATION,
Plaintiff-in-Intervention, Appellants,

vs.

JIM BACA, Director of the New Mexico
Department of Alcoholic Beverage Control,
Defendant-Appellee.

CERTIFICATE OF SERVICE

Charles W. Daniels, counsel of record for Guiness-Harp Corporation certifies that a true copy of Appellant's Notice of Appeal was served on all parties required to be served on this 6th day of October, 1983:

Andrea B. McCarty
Assistant Attorney General
Attorney for the Director of the New Mexico
Department of Alcoholic Beverage Control
P.O. Box 1508
Santa Fe, New Mexico 87504

William S. Dixon
Attorney for Miller Brewing Company
P.O. Box 1888
Albuquerque, New Mexico 87103

by placing the same in an envelope properly addressed, with sufficient postage affixed thereto, and depositing the same in the United States Mail.

FREEDMAN, BOYD & DANIELS, P.A.

By Charles W. Daniels

CHARLES W. DANIELS
Attorneys for The Guiness-Harp Corporation
20 First Plaza, Suite 212
Albuquerque, New Mexico 87102
Telephone: (505) 842-9960

It is hereby certified that
a copy of the foregoing was
mailed to counsel of record
this 6th day of October, 1983

CHARLES W. DANIELS

APPENDIX F

The 1979 law—New Mexico Statutes Annotated 1978, §§ 60-12-1 through 60-12-10 are as follows:

60-12-1. SHORT TITLE.

This act may be cited as the "Discrimination in Selling Act."

60-12-2. FILING OF SCHEDULES REQUIRED.

No brand of alcoholic liquor shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a schedule is filed with the chief of the liquor control division [director of the department of alcoholic beverage control] and is then in effect. For the purposes of the Discrimination in Selling Act "alcoholic liquor" means alcoholic liquor as defined in Section 60-3-1 NMSA 1978.

60-12-3. FORM OF SCHEDULE.

The schedule shall be in writing, duly verified and filed in the number of copies, form and time as required by the chief of the liquor control division [director of the department of alcoholic beverage control]. It shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to wholesalers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in combination with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any.

60-12-4. SELLING TO WHOLESALERS AT PRICES DIFFERENT THAN SHOWN IN SCHEDULE.

The brand of alcoholic liquor shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the chief of the liquor control division [director of the department of alcoholic beverage control] is granted for good cause shown and for reasons not inconsistent with the purposes of the Discrimination in Selling Act.

60-12-5. FILING OF SCHEDULES.

The schedule shall be filed by the owner of the brand who is the holder of a nonresident license issued by the division of liquor control [department of alcoholic beverage control].

60-12-6. FILING OF AFFIRMATION.

There shall be filed in connection with, and when filed shall be deemed part of, the schedule filed for a brand of alcoholic liquor, an affirmation duly verified by the owner of the brand of alcoholic liquor that the bottle and case price of alcoholic liquor to wholesalers set forth in the schedule is no higher than the lowest price at which such item of liquor was sold by the brand owner, or any related person, to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state or state agency which owns and operates retail liquor stores at any time during the calendar month immediately preceding the month in which the schedule is filed. As used in this section "related person" means any person:

A. in the business of which the brand owner has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers;

B. in the exclusive, principal or substantial business of selling a brand or brands of alcoholic liquor purchased from the brand owner; or

C. who has an exclusive franchise or contract to sell the brand or brands.

60-12-7. FAILURE TO FILE [AFFIRMATION]; SCHEDULE DEEMED INVALID.

In the event an affirmation with respect to any item of alcoholic liquor is not filed within the prescribed time, any schedule for which the affirmation is required shall be deemed invalid with respect to that item of alcoholic liquor, and no such item may be sold to or purchased by any wholesaler during the period covered by any such schedule.

60-12-8. DETERMINATION OF LOWEST PRICE.

In determining the lowest price for which any item of alcoholic liquor was sold in any other state or in the District of Columbia, or to any state or state agency which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state or state agency or retailer, as the case may be, purchasing such item in the other state or in the District of Columbia; provided nothing contained in the Discrimination in Selling Act shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this section, "state taxes and fees" means the excise taxes imposed or the fees required by any state or the District of Columbia upon, or based upon, the gallon of liquor, and the term "gallon" means two hundred thirty-one cubic inches.

60-12-9. VIOLATION: PENALTY;

A. Violation of the Discrimination in Selling Act is a violation of the Liquor Control Act [7-17-1 to 7-17-11, 7-24-1 to 7-24-7, 60-3-1 to 60-11-4 NMSA 1978].

B. Notwithstanding any other penalty provided in the Liquor Control Act, any person who knowingly makes a false statement in any affirmation made and filed pursuant to the Discrimination in Selling Act shall be liable for suspension of any license issued by the division of liquor control [department of alcoholic beverage control] for a period not to exceed five days for the first offense and thirty days for each offense thereafter.

60-12-10. AUTHORITY TO REFUSE AFFIRMATIONS.

Upon final judgment of conviction of any person after appeal, or in the event no appeal is taken, upon the expiration of the time during which an appeal could have been taken, the

chief of the liquor control division [director of the department of alcoholic beverage control] may refuse to accept for any period of months not exceeding three calendar months any affirmation required to be filed by such person.

APPENDIX G

The 1981 amendments—New Mexico Statutes Annotated 1978, §§ 60-8A-12 through 60-8A-18 (1981 Replacement Pamphlet) are as follows:

60-8A-12. FILING OF SCHEDULES REQUIRED.

A. No brand of alcoholic beverages shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a price and discount schedule is filed with the director and is then in effect.

B. Such schedule shall be filed by the owner of the brand who is the holder of a nonresident license issued by the department.

60-8A-13. SELLING TO WHOLESALERS AT PRICES DIFFERENT THAN SHOWN IN SCHEDULE.

A brand of alcoholic beverages shall not be sold to wholesalers except at the price and discounts shown on the schedule unless prior written permission of the director is granted for reasons not inconsistent with the purposes of Sections 62 through 69 [60-8A-12 to 60-8A-19 NMSA 1978] of the Liquor Control Act.

60-8A-14. FORM OF SCHEDULE.

The schedule of prices and discounts shall be in writing, duly verified and filed in the number of copies, form and at such time as required by the director. It shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents and age and proof where stated on the label; the number of bottles contained in each case; the bottle and case price to wholesalers, which shall be individual for each item; the discounts for quantity, if any; and the discounts for time of payment, if any.

60-8A-15. FILING OF AFFIRMATION.

The owner of a brand of alcoholic beverages shall file as part of the schedule a verified affirmation that the price to New Mexico wholesalers is no greater than the lowest price at which the item of alcoholic beverages is sold by the brand owner or any related person to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state or state agency which owns and operates retail liquor stores. As used in this section, "related person" means any person:

A. in any business in which the brand owner has an interest, direct or indirect, by stock or other security ownership, as lender or lienor or by interlocking director or officer;

B. in the exclusive, principal or substantial business of selling a brand of alcoholic beverages purchased from the brand owner; or

C. who has an exclusive franchise or contract to sell the brand of alcoholic beverages.

60-8A-16. FAILURE TO FILE; SCHEDULE DEEMED INVALID.

If an affirmation with respect to any item of alcoholic beverages is not filed within the prescribed time, any schedule for which the affirmation is required shall be deemed invalid with respect to that item of alcoholic beverages, and the item shall not be sold to or purchased by any wholesaler during the period covered by the schedule.

60-8A-17. DETERMINATION OF LOWEST PRICE.

In determining the lowest price for which any item of alcoholic beverages was sold in any other state or in the District of Columbia, or to any state or state agency which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under the schedule, and all rebates, free goods, allowances and

other inducements of any kind whatsoever offered or given to any such wholesaler, state or state agency or retailer, as the case may be, purchasing the item in the other state or in the District of Columbia. Nothing contained in Sections 62 through 69 [60-8A-12 to 60-8A-19 NMSA 1978] of the Liquor Control Act shall prevent differentials in price which make only due allowance for differences in state taxes and fees and in the actual cost of delivery. As used in this section, "state taxes and fees" means the excise taxes imposed or the fees required by any state or the District of Columbia upon, or based upon, the liter of alcoholic beverages.

60-8A-18. VIOLATION; PENALTY.

Any person who knowingly makes a false statement in any affirmation made and filed pursuant to Sections 62 through 69 [60-8A-12 to 60-8A-19 NMSA 1978] of the Liquor Control Act shall be liable for suspension of any license issued by the department for a period not to exceed five days for the first offense and thirty days for each offense thereafter.

Office - Supreme Court, U.S.
FILED
JAN 26 1984
ALEXANDER L. STEVAS
CLERK

No. 83-911
No. 83-927

IN THE

Supreme Court of the United States

October Term, 1983

UNITED STATES BREWERS ASSOCIATION, INC., *et al.*,
Appellants,

vs.

ABE RODRIGUEZ, DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

MOTION OF APPELLEE TO DISMISS OR AFFIRM

PAUL BARDACKE
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Counsel of Record

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(505) 827-6000

Attorneys for Appellee

VERGARA PRINTING CO. · SANTA FE, NEW MEXICO

QUESTION PRESENTED

Whether New Mexico's "price affirmation" law, regulating prices which may be charged to New Mexico wholesalers by those importing beer into New Mexico, is a constitutional exercise of state powers under the Twenty-first Amendment to the United States Constitution, as against a claim that the law offends the Commerce Clause and Supremacy Clause of the United States Constitution by reason of federal antitrust law preemption?

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No. 83-911
No. 83-927

IN THE

Supreme Court of the United States

October Term, 1983

UNITED STATES BREWERS ASSOCIATION, INC., *et al.*,
Appellants,

vs.

ABE RODRIGUEZ, DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

MOTION OF APPELLEE TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the United States Supreme Court, appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of New Mexico. This motion is submitted in response to both the jurisdictional statement of Anheuser-Busch, Inc. and that of the remaining appellants, United States Brewers Association, *et al.* This motion is made on grounds that the appeal does not present a substantial federal question and that the questions raised are so unsubstantial as not to merit further argument because the governing law is clear and the decision below was correct.

STATUTES INVOLVED

This appeal raises the question of the validity of certain New Mexico statutes known as the Discrimination in Selling Act. This Act was enacted by New Mexico Laws 1967, Chapter 269 and was amended in 1979 to substitute "alcoholic liquor" as defined in Section 60-3-1 NMSA 1978 for "spiritous liquors" as defined in that section. New Mexico laws 1979, Chapter 83, Section 1. This amendment had the effect of including beer within the provisions of the Discrimination in Selling Act. A copy of these statutes appear at Appendix A.

In pertinent part, the Act requires that price schedules be filed with the Department of Alcoholic Beverage Control reflecting the price to be paid by New Mexico wholesalers for beer which the wholesalers purchase and further requires that an affirmation be filed stating that the "bottle and case price of alcoholic liquor to wholesalers set forth in the schedule is no higher than the lowest price at which such item of liquor was sold by the brand owner, or any related person, to any wholesaler anywhere in any other state of the United States . . . at any time during the calendar month immediately preceding the month in which the schedule is filed." Failure to file the affirmation results in invalidity of the price schedule and consequent prohibition of sale to or purchase by the New Mexico wholesaler of the item during the period of the schedule.

In 1981 the Act was repealed and re-enacted as part of a new Liquor Control Act. Such re-enacted law appears at Sections 60-8A-12 through 60-8A-19 NMSA 1978 (1981 Repl.) In pertinent part, the 1981 law deleted from the affirmation section the phrase, "at any time during the calendar month immediately preceding the month in which the schedule is filed."

STATEMENT OF THE CASE

The Discrimination in Selling Act, as amended in 1979 to encompass brewed products, was challenged by appellants in the New Mexico district court. Upon the request of appellants, a stay of enforcement as to appellants was agreed to by appellee conditioned upon execution by appellants of bonds in which they agreed to pay to the State of New Mexico the difference between the prices at which products were sold during the pendency of the stay and the prices at which the Act would have required them to be sold under the Act. Liability upon the bonds attaches if appellants are unsuccessful in challenging the Act. These affirmation statutes, insofar as they pertain to appellants, have not yet been enforced due to the stay. Appellants have resisted enforcement and pertinent discovery concerning bond liability until the proceeding in this Court is concluded.

The district court granted summary judgment in favor of the appellee on or about January 7, 1980, and the New Mexico Supreme Court affirmed the grant of summary judgment. The New Mexico Supreme Court decided this Court's holdings in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, *reh'g denied*, 384 U.S. 967 (1966) and *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982) were controlling. The New Mexico Supreme Court, therefore, rejected appellants' contentions that the Act violates the Commerce Clause to the United States Constitution and the Supremacy Clause by reason of federal antitrust statutory preemption. It instead upheld the Act as a valid exercise of the State's powers under the Twenty-first Amendment to the Constitution.

The New Mexico Supreme Court's opinion was filed July 21, 1983. The New Mexico Supreme Court did not address, nor was it specifically requested to address, the effect, if any, of

the above-mentioned change to the Act made by the 1981 laws.[1]

THIS CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, *reh'g denied*, 384 U.S. 967 (1966), upheld the validity of a state statute virtually identical to the New Mexico Discrimination in Selling Act, Sections 60-12-1, *et seq.*, NMSA 1978, now Sections 60-8A-12, *et seq.*, NMSA 1978 (1981 Repl.), in the face of challenges identical to those here. New Mexico's Discrimination in Selling Act is the same in all pertinent respects as the New York law involved in *Seagram*. Both laws require that liquor prices to wholesalers be "no higher than the lowest price" at which sales were made to wholesalers anywhere in the United States during the preceding month.

In *Seagram*, appellants attacked the New York law contending that its provisions placed an illegal burden upon interstate commerce, conflicted with federal antitrust legislation and thus was forbidden by the Supremacy Clause. Because the New York law had not been enforced as to the appellants due to stays, which situation is identical to this case, this Court concerned itself "only with the constitutionality of those provisions on their face." *Id.* at 41. *Seagram* involved the issue of "facial invalidity", not, as appellants argue, a "balancing of interests"

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[1] The New Mexico Supreme Court upheld the Discrimination in Selling Act, as amended in 1979. The 1981 law deleting "preceding month" was mentioned by appellants in pleadings relating to the *Healy* decision. Although appellants now request that this Court remand this case to the New Mexico Supreme Court to determine the effect of this change as it relates to the issues raised in this Court, appellants did not so request in their motion for rehearing filed in the New Mexico Supreme Court, a copy of which is attached at Appendix B.

unique to New York. With respect to the Commerce Clause challenge, this Court stated:

> The mere fact that Section 9 is geared to appellants' pricing policies in other states is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. *Id.* at 43.

In *Seagram*, appellants also contended that the New York law violated the Supremacy Clause, claiming inconsistency between Section 9 of that law and the federal antitrust laws, specifically the Sherman Act and the Clayton Act, as amended by the Robinson-Patman Act. This Court stated:

> Section 9 imposes no irresistible economic pressure on the appellants to violate the Sherman Act in order to comply with the requirements of Section 9. . . . *Id.* at 45.

This Court also found that any potential conflict with the Robinson-Patman Act was "entirely too speculative", *Id.* at 46, and further noting:

> Moreover Section 7 of Chapter 531 has amended the ABC Law by granting the State Liquor Authority ample discretion to modify the schedule requirements. We cannot presume that the Authority will not exercise that discretion to alleviate any friction that might result should the ABC Law chafe against the Robinson-Patman Act or any other federal statute. *Id.* at 46.

Like the State Liquor Authority in New York, the Director of the New Mexico Department of Alcoholic Beverage Control is granted authority to premit deviation from the "price and discounts then in effect" for "good cause shown and for reasons not inconsistent with the purposes of the Discrimination in Selling Act."

The New Mexico Supreme Court thus ruled upon the Commerce Clause and Supremacy Clause issues before it in this case in the fashion dictated by this Court in *Seagram*. In addition, by permitting appellants to raise these issues again in a "concrete case" after enforcement when and if such case should arise, the New Mexico Supreme Court again adhered to *Seagram*, wherein this Court stated:

> Although it is possible that specific future applications of Chapter 531 may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that, so considered, the legislation is constitutionally valid. *Id.*, at 52.

This case is factually and legally identical to *Seagram*. The New Mexico Supreme Court unerringly followed the command of this Court in upholding New Mexico's Discrimination in Selling Act.

This Court reaffirmed its facial antitrust ruling made in *Seagram* in the case of *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982). In *Rice*, this Court upheld a California "designation" statute requiring that licensed importers of distilled spirits be designated by the brand owner as an authorized importer. The statute was challenged on the basis of federal antitrust preemption. The California courts agreed that the statute was unconstitutional, enjoined enforcement and this Court reversed. In *Rice*, this Court stated:

> Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. *Id.*, at 661.

New Mexico's statutes do not mandate or authorize conduct that necessarily constitutes a violation of the antitrust laws in all cases nor do they impose irresistible pressure upon parties to violate the antitrust laws. The concurring opinion in *Rice* viewed the law in *Seagram* as a "public regulatory scheme", which scheme is less subject to antitrust challenge than a scheme permitting "private" regulatory power.

Appellants, conceding that the challenged New York law is "similar" to the 1979 New Mexico law,[2] have advanced no convincing argument to distinguish *Seagram* from the case at bar. The fact that beer is involved in this case does not distinguish it from *Seagram*. The Twenty-first Amendment to the United States Constitution does not distinguish between alcohol which is spiritous liquor and alcohol which is beer. The regulatory interests of New York are not dissimilar from the regulatory interests of New Mexico.

Appellants, in support of their arguments, rely principally upon *California Retail Liquor Dealers Assocation v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) and *United States Brewers Association v. Healy*, 692 F.2d 275 (2nd Cir. 1982), summarily affirmed, No. 82-1493, 52 U.S.L.W. 3308 (Oct. 17, 1983).

Midcal was a resale price maintenance case. There, California law required distributors of wine to file with the state either fair trade contracts or price schedules. All California

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[2] Appellants U.S. Brewers Association, *et al.* address their arguments to the 1981 rather than the 1979 law. Although they argue that the 1981 New Mexico law is dissimilar from that involved in *Seagram* because such law deletes "preceding month", this Court in *Seagram* noted the existence of seventeen other state statutes which gear the affirmations to "cover prices in other states at the very time of sale" to the state requiring the affirmation. *Id.* at 45, and perceived no distinct Commerce Clause issue engendered because of those affirmations, stating only that the burden of gathering information required for the affirmations "might" be more onerous in those particular states.

retailers were required to sell wine at the price the distributors fixed. This Court stated, in upholding the California court's declaration of unconstitutionality, that the statute "plainly constitutes resale price maintenance." *Id.* at 103. This Court in *Rice* explained *Midcal* as holding that "the statute facially conflicted with the Sherman Act because it *mandated* resale price maintenance." 458 U.S. at 659. By contrast New Mexico law does not mandate resale price maintenance. The *Midcal* Court noted the *Seagram* decision and perceived no inconsistency between the two decisions.

Healy actually supports the appellee. Although invalidating Connecticut law, the *Healy* court stated:

> Given the latitude allowed a state under the Twenty-first Amendment to regulate the sale of liquor within its own borders, the holding in *Seagram* might well validate beer price regulation less intrusive than the present Connecticut statute, such as a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states. 692 F.2d at 283, 284.

Here, New Mexico's statute requires simply that the brewers set their New Mexico prices at the lowest levels they choose to set in other states.

Healy involved a Connecticut statute acutely dissimilar from New Mexico's statute because it set minimum prices in other states which out-of-state manufacturers could charge out-of-state wholesalers.[3] Connecticut required an affirmation to the effect that the bottle, can, or case price to the wholesaler in Connecticut will be no higher than the lowest price at which each such item of beer is sold in any state bordering Connecticut "at any time during the calendar month covered by such posting".

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[3] The Connecticut statutes as depicted in *Healy* appear at Appendix C.

The posted prices governed the prices which could be charged for a period of one month following the posting.

Because the Connecticut statute was geared to the *future*, it effectively set minimum prices for the *future* which could be charged in the four-state area surrounding Connecticut. Once the price was posted in Connecticut, applicable to the succeeding month, the law set prices in other states for that succeeding month. As noted by the *Healy* court:

> Thus, the obvious effect of the Connecticut statute is to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut. 692 F.2d at 282.

The *Healy* court distinguished *Seagram*, by stating:

> The New York statute differed significantly from the Connecticut statute, because, unlike Connecticut's beer price affirmation provisions which control brewers' future conduct in the states surrounding Connecticut, the New York law in *Seagram* merely required that New York prices reflect what had been charged elsewhere in the past. Thus, the New York law, although it affected the prices that manufacturers would choose to set in other states, did not limit the freedom of a manufacturer at any given time to raise or lower prices in any other state. 692 F.2d at 283.

New Mexico law does not control future prices at which a brewer may wish to sell its beer in other states. Nor does the 1981 New Mexico law, Section 60-8A-15, *supra*, operate so as to set future prices in other states.

Although appellants argue that an interaction of New Mexico's and one other state's affirmation laws utilizing "preceding month" could result in the inability to ever raise prices again in those states, appellee would point out that New Mexico's law has been in effect with respect to spiritous liquors

since 1967, that laws which other states may adopt is a matter of conjecture, that a state may presumably fix liquor prices, *see* concurring opinion in *Rice*, and, further, that the "preceding month" language no longer appears in New Mexico's statutes. Therefore, whatever interaction could have occurred between 1979 and 1981 can, obviously, not occur now.

Finally, appellee submits that this Court should not entertain a challenge to New Mexico's statutes based on the factual consequences of the law until a future case, if one should arise, squarely presents factual consequences in a specific enforcement controversy.[4] Other questions of statutory interpretation may arise upon enforcement of the statutes, such as the existence of federal statutory constraints imposed upon the Director's exercise of discretion to permit deviation from price schedules in the context of a specific fact situation or the meaning of "discounts" or permitted price differentials "which make only due allowance for differences . . . in the actual cost of delivery" in the context of specific fact situations. But at the present time, these questions are merely speculative. This case is not sufficiently concrete to entertain any challenge other than a facial challenge to the statutes, and, when so considered, the statutes are constitutional.

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[4] Appellants have, at pages 32 and 33 of their brief-in-chief, argued the availability of avoidance mechanisms, such as using odd-sized cans in New Mexico, a result which the Connecticut statutes would clearly not have permitted. Section 30-63c(b). Whether there is such avoidance mechanism is a question of statutory interpretation which may arise upon bond litigation or in other contexts.

CONCLUSION

Appellee respectfully submits that this appeal should be dismissed or the decision of the New Mexico Supreme Court affirmed.

Respectfully submitted,

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January 25, 1984

APPENDIX A

The 1979 law–New Mexico Statutes Annotated 1978, §§60-12-1 through 60-12-10 are as follows:

60-12-1. SHORT TITLE.

This act [60-12-1 to 60-12-10 NMSA 1978] may be cited as the "Discrimination in Selling Act."

60-12-2. FILING OF SCHEDULES REQUIRED.

No brand of alcoholic liquor shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a schedule is filed with the director of the department of alcoholic beverage control and is then in effect. For the purposes of the Discrimination in Selling Act [60-12-1 to 60-12-10 NMSA 1978], "alcoholic liquor" means alcoholic liquor as defined in Section 60-3-1 NMSA 1978.

60-12-3. FORM OF SCHEDULE.

The schedule shall be in writing, duly verified and filed in the number of copies, form and time as required by the chief of the liquor control division [director of the department of alcoholic beverage control]. It shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to wholesalers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in combination with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any.

60-12-4. SELLING TO WHOLESALERS AT PRICES DIFFERENT THAN SHOWN IN SCHEDULE.

The brand of alcoholic liquor shall not be sold to wholesalers except at the price and discounts then in effect unless prior

written permission of the chief of the liquor control division [director of the department of alcoholic beverage control] is granted for good cause shown and for reasons not inconsistent with the purposes of the Discrimination in Selling Act [60-12-1 to 60-12-10 NMSA 1978].

60-12-5. FILING OF SCHEDULES.

The schedule shall be filed by the owner of the brand who is the holder of a nonresident license issued by the division of liquor control [department of alcoholic beverage control].

60-12-6. FILING OF AFFIRMATION.

There shall be filed in connection with, and when filed shall be deemed part of, the schedule filed for a brand of alcoholic liquor, an affirmation duly verified by the owner of the brand of alcoholic liquor that the bottle and case price of alcoholic liquor to wholesalers set forth in the schedule is no higher than the lowest price at which such item of liquor was sold by the brand owner, or any related person, to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state or state agency which owns and operates retail liquor stores at any time during the calendar month immediately preceding the month in which the schedule is filed. As used in this section "related person" means any person.

A. in the business of which the brand owner has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers;

B. in the exclusive, principal or substantial business of selling a brand or brands of alcoholic liquor purchased from the brand owner; or

C. who has an exclusive franchise or contract to sell the brand or brands.

60-12-7. FAILURE TO FILE [AFFIRMATION]; SCHEDULE DEEMED INVALID.

In the event an affirmation with respect to any item of alcoholic liquor is not filed within the prescribed time, any schedule for which the affirmation is required shall be deemed invalid with respect to that item of alcoholic liquor, and no such item may be sold to or purchased by any wholesaler during the period covered by any such schedule.

60-12-8. DETERMINATION OF LOWEST PRICE.

In determining the lowest price for which any item of alcoholic liquor was sold in any other state or in the District of Columbia, or to any state or state agency which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state or state agency or retailer, as the case may be, purchasing such item in the other state or in the District of Columbia; provided nothing contained in the Discrimination in Selling Act [60-12-1 to 60-12-10 NMSA 1978] shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this section, "state taxes and fees" means the excise taxes imposed or the fees required by any state or the District of Columbia upon, or based upon, the gallon of liquor, and the term "gallon" means two hundred thirty-one cubic inches.

60-12-9. VIOLATION: PENALTY.

A. Violation of the Discrimination in Selling Act [60-12-1 to 60-12-10 NMSA 1978] is a violation of the Liquor Control Act [7-17-1 to 7-17-11, 7-24-1 to 7-24-7, 60-3-1 to 60-11-4 NMSA 1978].

B. Notwithstanding any other penalty provided in the Liquor Control Act, any person who knowingly makes a false statement in any affirmation made and filed pursuant to the Discrimination in Selling Act shall be liable for suspension of any license issued by the division of liquor control [department of alcoholic beverage control] for a period not to exceed five days for the first offense and thirty days for each offense thereafter.

60-12-10. AUTHORITY TO REFUSE AFFIRMATIONS.

Upon final judgment of conviction of any person after appeal, or in the event no appeal is taken, upon the expiration of the time during which an appeal could have been taken, the chief of the liquor control division [director of the department of alcoholic beverage control] may refuse to accept for any period of months not exceeding three calendar months any affirmation required to be filed by such person.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

UNITED STATES BREWERS ASSOCIATION, INC., *et al.*,

Plaintiffs-Appellants.

-vs- No. 13,053

JOHN ROMERO, Director of the New Mexico Department of Alcoholic Beverage Control,

Defendant-Appellee.

MOTION FOR REHEARING

Appellants, by their undersigned counsel and pursuant to Rule 19 of the Rules of this Court, respectfully move the Court for a rehearing in this matter. As grounds, Appellants state:

(1) Appellants respectfully submit that the Court has misapprehended the Appellants' argument with respect to the due process issue and has overlooked the applicability of the due process clause of the New Mexico Constitution, Article II, Section 18, as it applies to this case. In the opinion of the Court at page 12, the Court rejected Appellants' due process arguments by relying upon the United States Supreme Court decision in *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966). Appellants were not relying solely on the due process clause of the Fourteenth Amendment to the United States Constitution, which was the provision involved in *Hostetter*. Appellants were relying to a great extent on the State due process clause, which had been heretofore interpreted by this Court in *Drink, Inc. v. Babcock*, 77 N.M. 277, 421 P.2d 798 (1966). This Court took into consideration the fact that the federal due process clause had not be interpreted as prohibiting

mandatory uniform mark-up provisions. This Court held, however, that the State due process clause was violated by the mark-up provisions, notwithstanding the fact that, as a general proposition, the liquor business might be regulated in the interest of the public welfare. 77 N.M. at 284. It is that same State due process clause that Appellants rely on in this appeal.

(2) Appellants respectfully submit that the opinion of the Court overlooked the opinion of the United States Court of Appeals for the Second Circuit in *United States Brewers Association, Inc. v. Healy*, 692 F.2d 275 (2nd Cir. 1982), which struck down as violative of the Commerce Clause a similar statute enacted by the State of Connecticut. Although the *Healy* case has been appealed by the State of Connecticut to the United States Supreme Court, that Court has not yet taken any action that would indicate the appeal will be successful or even heard formally.

(3) Appellants respectfully submit that the Court has misapprehended the applicability of the Twenty-First Amendment to the State police power and due process issues in this case. At page 12 of the opinion, it is stated that the states have been conferred with something more than a nominal degree of authority in regulating the liquor business by virtue of the Twenty-First Amendment. While that is true as a generality, the Twenty-First Amendment neither enlarges nor decreases the police powers or constitutional provisions of the states in the matter of liquor regulation. It merely provides that the federal government may not interfere in certain respects with the importation and sale of liquor in the various states. The Amendment therefore does not bear upon whether this New Mexico statute violates New Mexico constitutional provisions or exceeds police powers of the state under the due process clause of that constitution.

(4) Appellants respectfully submit that the Court's opinion misapprehends the applicability of *California Retail Liquor*

Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), in which the United States Supreme Court struck down as violative of the Commerce Clause of the United States Constitution a California retail price maintenance statute. The Court looked at the underlying purposes of the Twenty-First Amendment in scrutinizing whether the state statutory scheme was truly a regulation protected by the Twenty-First Amendment's recognition of the state's rights to regulate the importation and sale of alcoholic liquor. *Midcal* expressly recognized that the further the state strayed from the language and purpose of the Twenty-First Amendment and attempted to regulate aspects of liquor not directly related to transportation and importation, the Twenty-First Amendment protection becomes attenuated and must be balanced with the commerce clause protections of a free and competitive national economy. The affidavits presented in this case showed the existence of a concrete case with existing factual issues as to which the competing interests of the Twenty-First Amendment and the Commerce Clause could be weighed and applied. Summary judgment was therefore inappropriate.

WHEREFORE, Appellants respectfully move the Court to grant a rehearing and reconsider the opinion heretofore filed.

Respectfully submitted,

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(Cont. from p. A-7)

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I HEREBY CERTIFY that a true copy of the foregoing was mailed to opposing counsel of record on this 3rd day of August, 1983.

s/ Charles W. Daniels
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APPENDIX C

CONNECTICUT STATUTES

Section 30-63(c) (West Supp. 1982) provides, in pertinent part, as follows:

> Each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department the bottle, can and case price of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting . . . A manufacturer or wholesaler may amend his posted price for any month to meet a lower price posted by another manufacturer or wholesaler with respect to alcoholic liquor bearing the same brand or trade name and of like age, vintage, quality and unit container size; provided that any such amended price posting shall be filed before three o'clock P.M. of the fourth business day after the last day for posting prices; and provided further such amended posting shall not set forth prices lower than those being met.

Section 30-63b(b) (West Supp. 1982) provides as follows:

> At the time of posting of the bottle, can and case price required by section 30-63, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that the bottle, can or case price to the wholesaler permittees during the period of the posting will be no higher than the lowest price at which each such item of beer is or will be sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state, at any time during the calendar month covered by such posting.

Section 30-63a(b) (West Supp. 1982) provides as follows:

> No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

Section 30-63c(b) (West Supp. 1982) provides as follows:

> In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered during such posted period by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "state taxes and fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits or each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and the term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes, approved by the department of liquor control, of his brand which he offers to any wholesaler in any state bordering this state.

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No. 83-911

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES BREWERS ASSOCIATION, INC., *et al.*,
Appellants,

v.

ABE RODRIGUEZ, Director of the New Mexico Department of Alcoholic Beverage Control, *Appellee.*

On Appeal From The Supreme Court Of The State Of New Mexico

APPELLANTS' REPLY BRIEF IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM

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UNITED STATES BREWERS ASSOCIATION, INC., *et al.*,
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v.

ABE RODRIGUEZ, Director of the New Mexico Department of Alcoholic Beverage Control, *Appellee.*

On Appeal From The Supreme Court Of The State Of New Mexico

APPELLANTS' REPLY BRIEF IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM[1]

The premise of New Mexico's motion to dismiss or affirm is that, in a case in which only declaratory and injunctive relief was sought, the New Mexico Supreme Court knowingly restricted itself to passing on the constitutionality of a statute that had been repealed and replaced with another, very different statute. The conclusion is that this Court should render a decision on the merits sustaining the constitutionality of the repealed statute.

[1] This brief is filed on behalf of all the parties who joined in the Jurisdictional Statement herein. (Jur. St. *i*, n.1.) The statement required by Rule 28.1 appears as Appendix A to the Jurisdictional Statement.

This proposition cannot be reconciled with this Court's established practice, with good sense, or with statements in the New Mexico Supreme Court's opinion. The State's motion should therefore be denied, the judgment below should be vacated, and the case should be remanded to the New Mexico Supreme Court for further consideration in light of the 1981 price affirmation statute, which is now the law of New Mexico, and this Court's recent decision striking down a similar price affirmation statute in *Healy* v. *United States Brewers Ass'n*, No. 82-1493 (Oct. 17, 1983).

1. This Court has "long followed a uniform practice where a supervening event raises a question of state law pertaining to a case pending on review here. That practice is to vacate and reverse the judgment and remand the case to the state court, so that it may reconsider it in the light of the supervening change in state law." *Bell* v. *Maryland*, 378 U.S. 226, 237 (1964). *See also Fusari* v. *Steinberg*, 419 U.S. 379, 387 (1975); *Sanks* v. *Georgia*, 401 U.S. 144, 150-51 (1971); *Roth* v. *Delano*, 338 U.S. 226, 231 (1949); *Dorchy* v. *Kansas*, 264 U.S. 286, 289 (1924). When the constitutionality of a state statute is challenged, this Court has consistently held that it must review the judgment below in light of state law "as it now stands" and not as it stood at some prior stage in the litigation. *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 52-53 (1980); *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (1972). There is no reason to deviate from this practice here. In the present posture of the case, the Court should not attempt to pass on the constitutionality of either the 1981 New Mexico statute, which the New

Mexico Supreme Court has not yet clearly addressed, or the 1979 statute, which has been repealed.[2]

2. The State's motion mirrors the confusion in the opinion below as to precisely what the New Mexico Supreme Court was deciding. Uncertainty as to the basis for the judgment below is a further ground for vacating the judgment and remanding the case. *See Villa* v. *Van Schaick*, 299 U.S. 152, 155 (1936).

The New Mexico Supreme Court dismissed as too abstract the substantive arguments of the appellant brewers below. The court said, among other things, that by their arguments the brewers asked it to engage in speculation because the price affirmation statute whose constitutionality was challenged had been stayed throughout the litigation and there was therefore no "concrete case" in which to assess the Commerce Clause and antitrust reasons that appellants advanced for invalidating the statute. (Jur. St. 9b; *see also id.* at 11b-12b.) The court concluded its opinion by saying that the brewers "are not precluded from bringing a future action upon the showing that [their] case has become 'concrete'. . . ." (*Id.* at 14b.)

In moving to dismiss or affirm, New Mexico invites attention to these passages in its highest court's opinion.

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[2] The question whether the constitutionality of the repealed 1979 statute is moot may itself turn on questions of state law, relating, among other things, to the interpretation of the brewers' undertakings at the time enforcement of the statute was initially enjoined and the impact of the statute's repeal on those undertakings. It is also appropriate to vacate the judgment and remand the case to the state court to permit it to determine, in the first instance, the issue of mootness. *Johnson* v. *New York State Education Dept.*, 409 U.S. 75 (1972).

saying that the court had permitted "appellants to raise these issues again in a 'concrete case' after enforcement when and if such case should arise . . . ." (Motion 6.) And it urges independently that the brewers are bound to await "a specific enforcement controversy" that will demonstrate "the factual consequences of the law." (*Id.* at 10.)

The court's invitation to further litigation to produce the "concrete case" thought lacking below, which the New Mexico Attorney General has renewed, is utterly inconsistent with the State's basic position on the motion to dismiss or affirm. That position, as we have said, is that the only subject of the decision below is the 1979 price affirmation statute originally challenged, which was repealed and replaced with the very different 1981 statute. The New Mexico Supreme Court could not have meant to invite further litigation concerning a statute no longer in effect. The Attorney General cannot be suggesting in his renewal of the invitation that the brewers should await a proceeding to enforce a statute that has been repealed and replaced with another statute.

There is no question of the relevance of the 1981 statute to this litigation. The problem is that the New Mexico Supreme Court has not dealt in terms with that highly relevant element of the litigation. The case should be remanded to accord that court the opportunity to do so.

3. New Mexico acknowledges the differences between the 1979 law and the 1981 law. In its motion it urges this Court in substance simply to disregard the differences on the ground that the 1981 statute was not before the New Mexico Supreme Court. Recognizing the frailty of that basic position, it also perfunctorily asserts that, in any event, the 1981 statute is distinguishable from the Connecticut price affirmation statute held unconstitu-

tional in *Healy* v. *United States Brewers Ass'n*, No. 82-1493 (Oct. 17, 1983), *affirming* 692 F.2d 275 (2d Cir. 1982), which on its face it appears to resemble. (Motion 9.)

Perhaps, if the statute were authoritatively construed by the New Mexico courts, such distinctions might appear. But the construction of the statute is for the New Mexico courts, not this Court.

To give the New Mexico Supreme Court the opportunity to consider the meaning of the 1981 statute, the impact of the repeal of the 1979 statute, and the applicability of this Court's decision in *Healy*, the judgment below should be vacated and the case remanded for the further consideration suggested in the jurisdictional statement. Certainly this Court should not dismiss or affirm, thereby ruling on the merits of a case the very issues in which are so murky.

CONCLUSION

It is respectfully submitted that the judgment of the New Mexico Supreme Court should be vacated and the case should be remanded for further consideration in light of the 1981 amendments to the New Mexico price affirmation law and this Court's decision in *Healy* v. *United States Brewers Ass'n*, No. 82-1493, 104 S.Ct. 265 (1983).

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No. 83-911
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES BREWERS ASSOCIATION, INC., *et al.*,
Appellants,

v.

ABE RODRIGUEZ, DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF NEW MEXICO

REPLY BRIEF OF APPELLANT ANHEUSER-BUSCH, INC. IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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Appellant Anheuser-Busch, Inc. ("Anheuser-Busch") respectfully submits this reply brief in opposition to the motion of appellee Abe Rodriguez, Director of the New Mexico Department of Alcoholic Beverage Control ("New Mexico"), to dismiss or affirm.

PRELIMINARY STATEMENT

New Mexico's motion for summary affirmance is based on the fundamentally erroneous premise that courts need not balance state interests against the burdens imposed on interstate commerce in determining the constitutionality of beer pricing statutes under the Commerce Clause. The state does not contend that its beer price affirmation statute furthers any interest whatsoever. New Mexico instead claims that the mere fact that the provisions of its statute are similar to those of a liquor affirmation statute sustained by this Court in *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, *reh'g denied,* 384 U.S. 967 (1966), forecloses the need to conduct a Commerce Clause analysis and renders the statute immune from constitutional scrutiny. But such a mechanical approach is inconsistent with *Seagram* itself and the cases which follow it, particularly *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). *Seagram* contained, and *Midcal* expressly requires, a balancing of the state and federal interests involved in determining the constitutionality of the New Mexico statute. Since New Mexico has utterly failed to advance any state interest promoted by the beer price affirmation provisions and, as New Mexico implicitly concedes, the lower courts failed to apply any balancing test in granting New Mexico's motion for summary judgment, the instant motion for summary affirmance or dismissal must be denied.[1]

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[1] New Mexico also asserts that since the statute challenged here has been repealed, Anheuser-Busch may not complain about the burdens such a statute imposes upon interstate commerce. At the same time, however, New Mexico asserts that Anheuser-Busch will be liable if the constitutionality of the statute is affirmed by this Court. (Motion to Dismiss or Affirm at 3) Obviously, New Mexico cannot have it both ways. An affirmance by this Court based upon a refusal to consider the statute's effects and validity because it has been repealed would permit New Mexico, with the approval of its highest court, to try to collect monetary penalties for alleged violations of an unconstitutional statute.

ARGUMENT

THE STATE'S INTERESTS, IF ANY, MUST BE BALANCED AGAINST THE FEDERAL INTEREST IN UNRESTRICTED COMMERCE

New Mexico argues essentially that since the present action involves a so-called "facial attack" upon the beer price affirmation provisions, (as opposed to an attack upon some application of those provisions), no balancing was required of the state interests, if any, advanced by the beer pricing scheme against the burdens upon, and strong federal interest in, interstate commerce. It contends that the similarity of language between this statute and the one approved in *Joseph E. Seagram & Sons, Inc. v. Hostetter, supra,* 384 U.S. 35 is enough to require summary affirmance of the statute as constitutional.

Such an argument makes no sense as a matter of policy and would require the repudiation of numerous decisions of this Court. Contrary to New Mexico's unsupported assumption that "facial attacks" do not require any balancing, this Court has repeatedly balanced the respective state and federal interests and invalidated state liquor laws *on their face,* as being repugnant to the Commerce Clause, *e.g., United States Brewers Association, Inc. v. Healy,* 692 F.2d 275 (2nd Cir. 1982), *aff'd,* 104 S.Ct. 265 (1983), the Supremacy Clause, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra,* 445 U.S. 97, and the Equal Protection Clause. *Craig v. Boren,* 429 U.S. 190 (1976).

Facial invalidation is particularly appropriate here. Anheuser-Busch's position is not that some particular price it may be forced to set in New Mexico will be in some sense "unfair" but rather that the Commerce Clause permits it to set prices throughout the nation as competitive conditions mandate without being constrained by the requirement that its New Mexico prices be no higher than the lowest price at which it chooses to sell elsewhere.

New Mexico's claim that this Court's decision in *Joseph E. Seagram & Sons, Inc. v. Hostetter, supra,* 384 U.S. 35, did not involve a "balancing of interests" is simply incorrect. The

Court did apply a balancing test in holding that the "drastic" remedy of price affirmation was justified in that case because the overwhelming evidentiary record submitted by the state, including specific legislative findings, established that it was necessary to advance important state interests—breaking the monopolistic grip of distillers in the state. 384 U.S. at 39. Thus, in *Seagram* this Court only upheld the statute after having determined that the state interests advanced by New York were substantial, but New Mexico has not and cannot make a similar showing here.[2] *Seagram* certainly does not give carte blanche approval to all legislation which tracks the language of the New York statute.

This reading of *Seagram* is confirmed by *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra,* 445 U.S. 97. In *Midcal,* this Court held that for statutes involving pricing of alcoholic beverages, the Twenty-first Amendment *requires* a balancing of the state's alleged interests in the legislation against the strong and familiar federal interests in competition and interstate commerce. After initially determining that the state legislation in *Midcal* constituted a violation of the Sherman Act, the Court considered the state's purported Twenty-first Amendment interests—temperance and orderly market conditions—and found them to be substantially

[2] The New Mexico courts, like the federal courts, may grant a motion for summary judgment only where there is no genuine issue as to any material fact, and the burden is on the movant to establish that it is entitled to judgment as a matter of law. N. M. Stat. Ann., Civ. P. R. 56; *Westgate Families v. City Clerk of Los Alamos,* 100 N.M. 146, 667 P.2d 453 (1983). In the present case, New Mexico moved for summary judgment and the district court granted the motion despite the terms of the statute and the evidence submitted by appellants, which raised serious questions concerning the burdens imposed on commerce. New Mexico failed to introduce any evidence to rebut that showing nor even asserted any valid state interests. Indeed, on the record before the New Mexico courts, it was appellants who were entitled to summary judgment.

outweighed by the federal interests, derived from the Commerce Clause,[3] in interstate competition. Accordingly, the Court declared the legislation to be invalid.

This Court's decision in *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), upon which New Mexico heavily relies, involves application of the same principles as *Midcal*. The only difference was that in *Rice* the Court determined that that statute, which merely regulated the manner in which alcoholic beverages could be imported into California, did not create a violation of the Sherman Act. Thus, no federal interest in competition was burdened by the statute and there was nothing to balance against the state's interest.[4]

The New Mexico beer price affirmation provisions, in contrast, by their terms restrain a brewer from freely setting prices in all states outside New Mexico. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). Just as in *Midcal* where the in-state wine price maintenance regulations were found to unconstitutionally violate the Sherman Act, the affirmation provisions unconstitutionally burden interstate commerce, and therefore New Mexico was required to put forward some state interests to support the legislation.

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[3] This Court in *Midcal*, 445 U.S. at 111, emphasized that the federal interests implicated therein were those embodied in the Commerce Clause because Congress " 'exercis[ed] all the power it possessed' under the Commerce Clause" when it enacted the Sherman Act. (citations omitted) In the present case, as Anheuser-Busch has demonstrated in its Jurisdictional Statement at 10-15, and New Mexico does not dispute, the statute under attack violates the Commerce Clause unless saved by the Twenty-first Amendment.

[4] *Rice* is inapplicable to the present case on two additional grounds. Initially, to the extent that appellants are challenging the New Mexico beer price affirmation provisions as being violative of the Commerce Clause, not the Sherman Act, the Court's holding in *Rice* is irrelevant. Furthermore, unlike the statutes in *Midcal* and in this case which regulate the setting of prices, the regulation challenged in *Rice* concerned the importation of alcoholic beverages into a state. *Midcal* recognized that states are permitted far broader discretion in regulating the means of importing and distributing alcoholic beverages within their boundaries than in regulating prices. 445 U.S. at 110.

Indeed, New Mexico has not attempted to refute or challenge the inevitable deleterious effects the beer price affirmation provisions have upon interstate commerce—elimination of pricing flexibility in other states, the regulation of prices in markets outside of New Mexico and lock-step price ceilings —which were set forth in Anheuser-Busch's Jurisdictional Statement and presented to the courts below. In fact, its only answer is to point out that the statute has since been amended (Motion to Dismiss or Affirm at 9-10), thereby virtually conceding that the old New Mexico beer price affirmation law, which New Mexico claims is automatically constitutional, would, if enacted by other states, have disastrous results.[5] Since New Mexico has concededly set forth no valid state interest that could possibly justify such burdens, the summary judgment ruling sustaining the constitutionality of the statute must be reversed.

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[5] New Mexico's hypothetical assertion that any burdens which the statute imposed upon interstate commerce might have been avoided by the Director of the Department of Alcoholic Beverage Control, pursuant to his statutory power to permit deviations from the requirements of the law, is specious. Such deviations can be granted only on a finding of good cause and may not be given for any reason which is inconsistent with the purposes of the law. N.M.S.A. § 60-12-4. Furthermore, New Mexico's position is inconsistent with the evidence of its own officers. James Baca, then the Director of the Department of Alcoholic Beverage Control, testified at his deposition (i) that if a brewer reduced prices in Wisconsin to meet competition he would not be given an exemption in New Mexico and would be required to lower his prices since the Director had "no other choice" under the law, Baca Dep. at 73-74, 89, 96-97; (ii) that brewers could not give price reductions to reflect increased shipping costs, Baca Dep. at 80; and (iii) that brewers would not be given exemptions to sell distressed beer (beer which is near expiration of its useful shelf life) at reduced prices in other states Baca Dep. at 98-99. In any event, the fact that a party suggests in response to a lawsuit, that under some undefined circumstances he may refrain from enforcing an unconstitutional statute does not render that statute valid. Cf. *United States v. Concentrated Phosphate Exporting Association*, 393 U.S. 199, 203 (1968).

CONCLUSION

Based upon the foregoing, it is respectfully submitted that New Mexico's Motion To Dismiss or Affirm should be denied and that this Court should note probable jurisdiction, or summarily reverse in light of prior rulings of this Court.

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